Petition

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No. 81-188

In the Supreme Court of the United States

OCTOBER TERM, 1981

CENTER FOR LABORATORY MEDICINE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether a diagnostic medical laboratory service devoted exclusively to performing tests on human specimens and analyzing those test results in order to assist hospitals, nursing homes, clinics and physicians in the diagnosis of disease and illness and the treatment of patients is a "health care institution" within the meaning of Section 2(14) of the National Labor Relations Act, as amended?

2. Whether an appellate court is required to render an opinion when it would have significant precedential value in an area of first impression under the national labor laws?

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CENTER FOR LABORATORY MEDICINE, INC.,
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NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Center for Laboratory Medicine, Inc. (the "Center")[1] respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Third Circuit in this case.

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[1] Petitioner, Center for Laboratory Medicine, Inc., a Pennsylvania corporation, is a wholly-owned subsidiary of the Damon Corporation, a Delaware corporation.

Opinions Below

The order and judgment of the court of appeals is not yet reported. It is reproduced herein as Appendix A. The decision and order of Respondent, the National Labor Relations Board (the "Board"), for which it applied for enforcement in the court of appeals is reported officially at 248 NLRB 728 (1980). It is reproduced herein as Appendix B.

Jurisdiction

The order and judgment of the court of appeals was entered on June 9, 1981. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

Statutes Involved

1. Section 2(14) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(14), provides that:

> (14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons.

2. Section 8(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a).

Statement of the Case

Petitioner, the Center, operates a diagnostic medical laboratory service which tests human specimens and then transmits its interpretation of the results of those tests to its clients, which include hospitals, nursing homes, clinics and physicians, to assist them in the diagnosis of illness and disease and the treatment of patients. The Center's main laboratory is located on a single floor in Trevose, Pennsylvania. It also operates a medical laboratory at the Tri-County Medical Center in Springfield, Pennsylvania as well as seven "bleeding stations" in the eastern Pennsylvania and southern New Jersey area from which specimens are taken directly from patients by Center employees and delivered for testing at the Trevose facility.

The Center's laboratory at Tri-County is the *sole* laboratory facility for that hospital and, as such, plays a critical and direct role in patient care and treatment at that hospital.[2] The Center's employees, either at the hospital or main laboratory in Trevose, conduct tests, including emergency tests in life and death situations, for Tri-County patients and actually visit these patients to draw the blood to be tested.[3] The Center's laboratory staff continually consults with the hospital's medical staff and other doctors regarding diagnostic conclusions to be drawn from test results. In addition, the Center has contracted with the Tri-County hospital to provide a duly qualified and licensed pathologist "to perform, whenever necessary, autopsies on hospital patients . . . and all cytology, tissue analysis, other cancer diagnosis, and other anatomical

[2] The Center's Trevose operation is highly integrated with the Tri-County facility and, in turn, patient care at the hospital as 60% of the tests performed for the hospital are conducted at the main laboratory, which also provides the Tri-County facility with all of its necessary supplies.

[3] In light of the often emergency need for their medical testing and diagnosis, both the main laboratory and the Tri-County laboratory operate on a 24-hour-per-day, 7-day-per-week basis.

pathological analysis work ...." In many cases the pathologist is required to conduct tests while the patient is on the operating table and to make diagnoses, often in life-threatening circumstances, which are indispensable to the making of major surgical decisions.

On June 15, 1978, Local 1357 of the United Food and Commercial Workers International Union (the "Union") filed an amended petition, Case No. 4-RC-13195, with the Board seeking certification pursuant to Section 9 of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. § 159, as the collective bargaining representative of all medical technologists and technicians at the Center's Trevose facility, but excluding all other employees therein and at the Center's other locations. In these underlying representation proceedings the Union, after a directed election was held, was ultimately certified on August 10, 1979[4] as the exclusive bargaining representative of the employees in the petitioned for unit.[5]

In September of 1979, the Union requested the Center to recognize and to bargain collectively with it as the exclusive bargaining representative of the technologists and technicians employed at the Trevose facility. The Center refused on the

[4] The final tally of ballots was 49 votes for the Union, 36 votes against the Union and 16 challenged ballots, 14 of which were cast by Center employees who worked at Tri-County. The Regional Director, in his Supplemental Decision on Challenged Ballots dated December 6, 1978, held that the Tri-County employees should not be included in a unit with their Trevose counterparts, and, without counting those votes, certified the Union as the exclusive representative of the Trevose technicians and technologists. On August 10, 1979, the Board affirmed his decision by telegraphic order.

[5] The Center contended throughout the representation proceedings, as well as in the subsequent unfair labor practice and appellate court enforcement proceedings, that this underlying certification was invalid in several respects, including, *inter alia*, the failure of the Board to consider the Congressional admonition against undue proliferation of bargaining units mandated by the Center's status as a "health care institution" within the meaning of the Act and to find the subject unit inappropriate because of its exclusion of a number of other employee classifications at Trevose and the satellite facilities, including the Tri-County laboratory.

ground that the underlying certification was invalid, *see* n.5, and, on October 15, 1979, the Union filed a charge alleging that said refusal constituted an unfair labor practice in violation of Section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5). On March 27, 1980, the Board issued its Decision and Order in which it found that the Center's refusal to bargain with the Union violated Section 8(a)(1) and (5) of the Act and ordered the Center to cease and desist from said violations and to post appropriate notices. *Center for Laboratory Medicine, Inc.*, 248 NLRB 728 (1980), a copy of which is reproduced herein as Appendix B.

On May 23, 1980, the Board applied to the United States Court of Appeals for the Third Circuit for enforcement of its order pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e). The court of appeals entered a judgment and order on June 9, 1981, summarily enforcing, without opinion, the Board's application for enforcement. Petitioner now seeks a writ of certiorari from this Court to review the Third Circuit's judgment enforcing the Board's order.

Reasons for Granting the Writ

A Writ of Certiorari Should Be Granted To Review An Important Issue of National Labor Law Concerning Which the Board Has Offered No Legally Supportable Guidance and Which the Court of Appeals Below Gave Unwarranted Summary Treatment.[6]

The case at bar presents an important question of national labor law of overriding significance to the public interest in

[6] Petitioner wishes to draw this Court's attention to the pending Seventh Circuit case of *North Suburban Blood Center* v. *NLRB*, *appeal docketed*, No. 80-2273 (7th Cir. Sept. 12, 1980), which presents the analogous question of whether a non-profit blood center supplying blood and blood components to approximately 13 hospitals in the northern metropolitan Chicago area is a "health care institution". Assuming the Seventh Circuit answers this question in the affirmative, petitioner submits that a grant of a writ of certiorari in the instant case would be further justified by the existence of a conflict between circuits with respect to an important issue of national labor law. The primacy of this issue is compelling alone, however, to warrant this Court's exercise of certiorari jurisdiction.

the uninterrupted delivery of patient care and health service: whether an operation devoted exclusively to the analysis and diagnosis of human specimens for hospitals, nursing homes, clinics and physicians is a "health care institution" within the meaning of Section 2(14) of the Act, 29 U.S.C. § 152(14).[7]

In answering this question, the Board, with the implicit endorsement of the court of appeals by way of summary order,[8] has taken the position that the Center is not a "health

[7] This provision was added as part of the 1974 health care amendments by which Congress extended the Act's coverage to non-profit hospitals that had been previously specifically excluded therefrom and, in addition, created a new category of employers — "health care institutions" — for whom special protections — including ten days' notice to the institution and the Federal Mediation and Conciliation Service of a labor organization's intent to engage in any "strike, picketing or other concerted refusal to work", Section 8(g), 29 U.S.C. § 158(g)— were designed in recognition of the impracticability of inventorying health care. *Cf. Laborers' International Union* v. *NLRB*, 567 F.2d 1006, 1007 (D.C. Cir. 1977). In recognition of the need to promote labor stability at "health care institutions", Congress also directed the Board to give "[d]ue consideration...to preventing proliferation of bargaining units in the health care industry." S. Rep. No. 988, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News, 3946, 3950; S. Rept. No. 766, 93d Cong. 2d Sess. 5 (1974); H. Rept. No. 1051, 93d Cong. 2d Sess. 7 (1974). This directive was sparked by the recognition that unit proliferation could cause jurisdictional disputes and recognitional strikes and a concomitant hiatus in patient care. *See St. Vincent's Hospital* v. *NLRB*, 567 F.2d 588, 590 (3d Cir. 1977).

[8] In granting the Board's application for enforcement of its order, the court of appeals must have rejected, albeit *sub silentio*, the Center's contention that it was a "health care institution". This is so since if the court had found otherwise, it would have denied enforcement given the Board's admitted failure to consider in this case the congressional admonition against undue proliferation of bargaining units, a consideration which the court has previously uniformly mandated in unit determinations involving such institutions in accordance with a congressional directive appearing throughout the legislative history of the amendments. *See St. Vincent's Hospital* v. *NLRB*, *supra*; *Memorial Hospital of Roxborough* v. *NLRB*, 545 F.2d 351 (3d Cir. 1976). Thus, the Board's conclusion that the Center was not a "health care institution" is properly attributable to the court of appeals.

Although the Board's conclusion is properly attributable to the court of appeals, a subsidiary question presented in this case is whether the court was required to render an opinion, especially when its order, given the absence of

care institution" because its testing of human medical specimens does not involve "patient care" and under its discernment of congressional intent, "the legislative history of the health care amendments makes clear [that] the special provisions of the Act applicable to health care institutions relate to 'patient care situations' and not to 'purely administrative health care connected facilities.'" *Center for Laboratory Medicine, Inc. d/b/a Damon Medical Center*, 234 NLRB 387 at n.3 (1978) (citation to Congressional Record omitted).[9]

Petitioner respectfully submits, however, that this resolution of the scope of Section 2(14)'s application merits this Court's further exploration, especially in light of the likely adverse impact the Board's and, by implicit endorsement, the court of appeal's cursory reading of the statutory language and legislative history will have on the unimpeded delivery of patient care throughout the nation — a concern that animated the passsage of the health care amendments. *Cf. St. Vincent's Hospital, supra*, 567 F.2d at 590.

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any appellate decisions on the scope of Section 2(14) and the primacy of the public interests discussed *infra*, has significant precedential weight. Although this Court has recognized that courts of appeals should have "wide latitude in their decisions of whether or how to write opinions . . . especially with respect to summary affirmances," *Taylor* v. *McKeithen*, 407 U.S. 191, 194 (1972), the Third Circuit's Internal Operating Procedures specifically circumscribe that latitude and allow the termination of a case by judgment order only when the panel unanimously determines, *inter alia*, that its decision, unlike that in the instant case, "has no precedential or institutional value". *See* Third Circuit Internal Operating Procedures, Chapter VI(A)(1), a copy of which is reproduced herein as Appendix D.

[9] This was a prior connected case involving the Center wherein the Board dismissed a petition seeking representation of a unit limited to all drivers employed at the Trevose laboratory, but excluding any other drivers employed by the Center at any other facility or at any other location, on the ground that the subject unit was inappropriate for bargaining purposes. A copy of the Board's decision is reproduced herein as Appendix C. The Board's disposition of the health care issue was cited as controlling by the Regional Director's Decision and Direction of Election in the representation proceedings underlying the instant case.

Indeed, as noted above at n.7, due to the serious effects on patient welfare likely to be caused by work stoppages, Congress made special notice requirements applicable to labor unions before strikes could be called at health care institutions and directed that the Board give special consideration to avoiding unit proliferation in the health care industry.[10] Excluding the Center from the Act's definition of a "health care institution" would subject it and similarly situated employers to strikes without notice and jurisdictional disputes with attendant, grave consequences for patient welfare.

The scenario for imperiled patient welfare such a reading would have does not require much imagination in the case of the Center. As discussed at some length above, the Center's employees, at both Trevose and Tri-County, are often called upon to perform tests for patients in life-threatening situations. In addition, the pathologist servicing Tri-County often performs his tests and makes critical diagnoses while the patient is on the operating table. Obviously, a strike without notice at the Center, or any medical laboratory, could result in the attending physician receiving tests results late, treatment being delayed, and the patient dying. Such consequences would undoubtedly be unavoidable in the case of Tri-County where the Center's laboratory, as noted above, is the sole

[10] In fashioning these protections Congress was especially sensitive to the impracticability of inventorying health care services in the nature of those provided by the Center. As Senator Dominick stated:

> *Hospital care is not storable.* It is essentially an immediate service to the sick and injured. *There is no stockpile from which to draw, no storage yard or warehouse backup potential as that found in many business fields.* If the health nurse, radiologic technician, *laboratory technologist*, electroencephalographic technician, physical therapist, surgical nurse, critical care nurse specialist, and many other numerous health care specialists are not at or near the bedside *or responsive on call to the need of patients*, the hospital ceases to function and the public interest is immediately downgraded and its welfare endangered.

Individual views of Mr. Dominick, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News, 3953 (emphasis added).

facility servicing the hospital. Its services, and those of Trevose by virtue of its high degree of functional integration therewith, are truly noninventoriable and of immediate need to the hospital's patients.[11]

Thus, the public interest in the avoidance of abrupt disruptions of service in the health care industry is indeed implicated by the conclusion below that the services offered by the Center, particularly at Tri-County, do not qualify it as a "health care institution". This public stake, it is submitted, lends dramatic significance to the labor law question presented in the case at bar. This Court should grant a writ of certiorari to address in a more sensitive manner the important labor law issue raised in this case — the scope of the definition of a "health care institution" under the Act.

Moreover, petitioner submits that the Board's cryptic resolution of this issue by drawing a distinction between "patient care situations" and "purely administrative health care connected facilities" merits more rigorous examination pursuant to certiorari review, especially since the source of the distinction illustrates its egregious misapplication to the Center.[12] The Board's distinction is rooted in a statement

[11] Except for the fact that the Center is a separate corporate entity, there does not appear to be any basis for distinguishing its services from those of hospital employees who certainly would be covered. *See* n.10, *supra*. It is clear, however, that any emphasis on this distinction is misplaced since the crucial factor in ascertaining an employer's status as a "health care institution" is the connection of its services to patient welfare—a connection which has been met by the Center, as discussed *infra*.

[12] One court characterized the Board's opinions in the health care area as being in a state of "disarray". *Long Island College Hospital* v. *NLRB*, 566 F.2d 833, 844 (2d Cir. 1977), *cert. denied*, 435 U.S. 996 (1978). In particular, the Board's decisions regarding the "institutional" status of blood banks have been remarkably convoluted as it held in 1967, prior to the health care amendments, in *Inter-County Blood Banks, Inc.*, 165 NLRB 252, 253 (1967), that a blood bank, like a non-profit hospital, was exempt from the Act's coverage since "intimately related to the operations of the hospitals to which it supplies blood for the treatment of patients", while in *San Diego Blood Bank*, 219 NLRB 116 (1975), decided after the amendments, held, without exploring whether this "intimate relationship" no longer existed, that such employers, though covered by the Act, were not "health care institutions".

made by Senator Taft, one of the co-sponsors of the bill eventually enacted into law, on the scope of the new definition:

> The scope of the application of this amendment is to include patient care situations and is not meant to include purely administrative health care connected facilities. As an example, an insurance company specializing in medical coverage would not fall under the scope of these amendments, but would remain under general coverage of the act. An administrative facility or operation within a hospital, however, would be within the scope of the amendments as there would be a connection directly and indirectly with ongoing patient care. The crucial connection is the welfare of the patients and such connection would in certain cases be mere geographical proximity to ongoing patient care. 120 Cong. Rec. S 7310 (Daily Ed. May 7, 1974).

Thus, by selective extraction the Board has patently overlooked the fact that the Center's operations cannot conceivably be analogized to those of Blue Cross or Blue Shield or other "purely administrative health connected" facilities. Moreover, the Board has ignored the very language it cites, which illustrates that in certain cases — where the operation or administrative facility is "within a hospital" — geographical proximity is dispositive of coverage under the amendments, since the Tri-County laboratory is the sole laboratory facility *at* the Tri-County hospital. Finally, even in the absence of this geographical nexus, it is noteworthy that the Board and court of appeals blithely passed over evidence irrefutably establishing that the Center's operations are directly and intimately connected with patient care. As noted throughout, Center employees often take specimens directly

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The Board's peremptory treatment of the status of blood banks is but further evidence of the need for this Court to address the scope of Section 2(14).

from patients, test specimens in emergency settings, and devote the remainder of their time to analysis and diagnosis of human specimens for other hospitals and doctors. Moreover, through the Tri-County pathologist, the Center is on the scene during surgery making critical diagnoses.

Conclusion

For the foregoing reasons, petitioner prays that a writ of certiorari be issued to review the order and judgment of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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JULY 29, 1981

APPENDIX A

United States Court of Appeals
For the Third Circuit

No. 80-1774

NATIONAL LABOR RELATIONS BOARD,
PETITIONER
vs.
CENTER FOR LABORATORY MEDICINE, INC.,
RESPONDENT

APPLICATION FOR ENFORCEMENT
NATIONAL LABOR RELATIONS BOARD
(BOARD NOS. 4-CA-10553 AND 4-RC-13195)

Argued
June 9, 1981
Before: ALDISERT, WEIS, and SLOVITER, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions of the petitioner and the respondent, it is

ADJUDGED AND ORDERED that the application of the National Labor Relations Board for enforcement of its order be and the same is hereby granted.

Costs taxed against respondent.

BY THE COURT,

_____, *Circuit Judge*

Attest:
(s) SALLY MRVOS
SALLY MVROS, *Clerk*

Dated: Jun 9 1981

APPENDIX B

248 NLRB No. 102

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE 4-CA-10553

CENTER FOR LABORATORY MEDICINE, INC.
and
UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1357, AFL-CIO[1]

DECISION AND ORDER

Upon a charge filed on October 15, 1979, by United Food and Commercial Workers International Union, Local 1357, AFL-CIO, herein called the Union, and duly served on Center for Laboratory Medicine, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, issued a complaint and notice of hearing on October 25, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 6, 1978, following Board elections in Case 4-RC-13195 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and

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[1] The name of the Union herein has been changed to reflect the new name resulting from the June 7, 1979, merger of the Retail Clerks International Union and Amalgamated Meatcutters and Butcher Workmen of North America.

[2] Official notice is taken of the record in the representation proceeding, Case 4-RC-13195, as the term "record" is defined in Secs. 102.68 and

that, commencing on or about September 20, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 2, 1979, Respondent filed its answer to the complaint, and on November 15, 1979, Respondent filed its amended answer to the complaint, admitting in part, and denying in part, the allegations in the complaint.

On January 4, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 17, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its response to the Notice To Show Cause and amended answer to the complaint, Respondent admits that it has refused to bargain with the Union, but asserts that the bargaining unit certified by the Board in Case 4-RC-13195 is inappropriate. It requests, *inter alia*, that the Board reexamine the Regional Director's failure to include in the appropriate unit all employees, both technical and nontechnical alike, at the

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102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va. 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Employer's main facility in Trevose, Pennsylvania, as well as those areas served by the Trevose facility on a daily basis. Respondent also requests the Board to review the Regional Director's sustaining of challenged ballots at the Tri-County Medical Center facility and argues that the Board's allowing voters at the Tri-County Medical Center to vote by means of the challenge procedure was inconsistent with the Act and deprived the Employer of the right to adequately communicate its point of view to the employees. Counsel for the General Counsel argues that Respondent is not presenting newly discovered or previously unavailable evidence which was not previously considered by the Board, and is merely attempting to relitigate issues which were or could have been raised in the prior representation proceeding. We agree with the General Counsel.

Our review of the record herein, including the record in Case 4-RC-13195 indicates that the Regional Director's Decision, Order, and Direction of Elections was issued on September 22, 1978. Respondent requested review of the decision and direction contending that the Regional Director erred in limiting the scope of the unit to technicians and technologists[3] at the Trevose facility. Respondent argued that the unit should have included a number of other employee classifications at the Trevose facility, as well as the Tri-County Medical Center and several other employer locations. The Board denied the request for review on October 18, 1978, but amended the Regional Director's decision to permit technicians and technologists at the Tri-County Medical Center to vote under challenge. The election was held on October 19 and 26, 1978. The tally of ballots in voting group A showed 38 votes cast for the Union and 18 against, with 6 challenged

[3] The Regional Director determined that the technologists were professional employees within the meaning of Sec. 2(12) of the Act and ordered a self-determination election for the technologists. He directed separate elections: voting group A included all technicians while voting group B included all technologists.

ballots. In voting group B, on the unit question there were 18 votes cast for inclusion of the technologists with the nonprofessional technicians, and 10 against, with 10 challenged ballots. Also in voting group B, there were 11 votes[4] cast for the Union, 18 against, with 10 challenged ballots. The challenged ballots were determinative both as to the unit question and the representation question in voting group B. No objections were filed. On December 6, 1978, the Regional Director issued a Supplemental Decision on Challenged Ballots sustaining the challenges of the employees at the Tri-County Medical Center and certifying the Union as the bargaining representative for the combined unit of voting groups A and B. On December 18, 1978, Respondent requested review of the supplemental decision and renewed the arguments it had made in its prior request for review. The Board granted the request for review on January 29, 1979, and thereafter affirmed the Regional Director's supplemental decision by telegram on August 10, 1979.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding,[6] and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision

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[4] One challenged ballot was cast by a voter employed at the Trevose facility. The other 10 challenged ballots were cast by technicians and technologists at the Tri-County Medical Center.

[5] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[6] Contrary to Respondent's contention, this case is not analogous to *National Health Laboratories, Inc.*, 239 NLRB No. 32 (1978). In that case, the issues did not involve a multilocation unit, nor did the Petitioner seek the separate representation of the technicians and technologists, as was the case here.

made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Pennsylvania corporation, is engaged in providing diagnostic services at various facilities in the Commonwealth of Pennsylvania, including its Trevose, Pennsylvania, facility. During the past year, a representative period, Respondent performed services valued in excess of $50,000, the results of which were shipped directly to points located outside the Commonwealth of Pennsylvania.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

United Food and Commercial Workers International Union, Local 1357, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective bargaining purposes within the meaning of Section 9(b) of the Act:

> All technicians and technologists employed by the Employer at its 3190 Tremont Avenue, Trevose, Pennsylvania, facility; but excluding all other professional and nonprofessional employees, guards and supervisors as defined in the Act.

2. The certification

On October 19 and 26, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 4, designated the Union as their representative for the purposes of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 6, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 17, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 20, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since September 20, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Center for Laboratory Medicine, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, Local 1357, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All technicians and technologists employed at the Employer's 3190 Tremont Avenue, Trevose, Pennsylvania, facility; but excluding all other professional and non-professional employees, guards and supervisers as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 6, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 20, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Center for Laboratory Medicine, Inc., Trevose, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food and Commercial Workers International Union, Local 1357, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All technicians and technologists employed by the Employer at its 3190 Tremont Avenue, Trevose, Penn-

sylvania, facility, but excluding all other professional and nonprofessional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at the Trevose, Pennsylvania, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. March 27, 1980

JOHN H. FANNING, *Chairman*
HOWARD JENKINS, JR. *Member*
JOHN C. TRUESDALE, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food and Commercial Workers International Union, Local 1357, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All technicians and technologists employed at the Employer's 3190 Tremont Avenue, Trevose, Pennsylvania, facility, but excluding all other professional and non-professional employees, guards and supervisors as defined in the Act.

CENTER FOR LABORATORY MEDICINE, INC.

_____
(EMPLOYER)

DATED_____ BY _____
(REPRESENTATIVE) (TITLE)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green Jr. Federal Building, Room 4400, 600 Arch Street, Philadelphia, Pennsylvania 19106, Telephone 215-597-7643.

APPENDIX C

234 NLRB No. 56

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 4-RC-12704

CENTER FOR LABORATORY MEDICINE, INC.
d/b/a DAMON MEDICAL CENTER
EMPLOYER

and

INDUSTRIAL WORKERS UNION LOCAL 837, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
PETITIONER

DECISION AND ORDER DISMISSING PETITION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer William Josem on June 21, 1977, and continued before Hearing Officer Phyllis Allen on July 12, 1977. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statement of Procedure, Series 8, as amended, the case was transferred to the Board for decision. Thereafter, the Employer filed a brief in support of its unit position.[1]

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[1] The Employer's brief was filed in the instant case and in connection with the proceedings in Case 1-RC-15120 in which a different labor organization petitioned for a similar unit limited to drivers at one of the Employer's laboratories located in another State. The Employer also moved the Board to consolidate the two proceedings (the Employer's Request for Review of the Regional Director's Decision and Direction of Election in Case 1-RC-15120 having been granted by the Board by telegraphic order dated June 28, 1977). Inasmuch as a hearing has been held and a full record developed independently in each of these proceedings, and absent any showing why these proceedings should now be consolidated, the Employer's motion is hereby denied.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officers' rulings made at the hearing and finds them free from prejudicial error. The rulings are hereby affirmed.

1. The Center for Laboratory Medicine, Inc., is a Pennsylvania corporation engaged in testing human specimens at its Trevose, Pennsylvania, facility. During the 12 months immediately prior to the date of the hearing the Employer sold or shipped services valued in excess of $50,000 directly to points located outside of the Commonwealth of Pennsylvania.

We find that Damon Medical Center is an employer within the meaning of Section 2(2) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. Petitioner is a labor organization and claims to represent certain employees of the Employer.

3. A question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. Petitioner seeks a unit of all drivers employed at the Employer's Trevose, Pennsylvania, laboratory excluding any other drivers employed by the Employer at any other facility or at any other location. The employer contends that the appropriate unit would include all technicians, medical technologists, laboratory aides, laboratory assistants, cytotechnologists, phlebotomists, customer relations employees, maintenance employees, accession employees, data point employees, telex operators, stockroom employees, plant clericals, data processing employees, dispatchers, drivers and lead drivers at the Trevose Laboratory, and at the area served by the Trevose laboratory on a daily basis.[2] The

[2] There are approximately 35 employees in the unit requested by the Petitioner and 350 employees in the unit which the Employer contends is ap-

Employer also urged at the hearing and in its brief to the Board that it is a health care institution within the meaning of the 1974 health care amendments and hence that any unit determination must be made in light of the Congressional admonition against undue proliferation of bargaining units in the health care industry.[3]

The Employer's main laboratory is located in Trevose, Pennsylvania, and operates on a 24-hour-per-day, 7-day-per-week basis. In addition to the main laboratory at Trevose, the Employer operates six bleeding stations—one at the main laboratory and the remaining five at separate locations. The employer serves hospitals, nursing homes, clinics, and private doctors by examining human medical specimens and interpreting test results.

In addition to the 35 drivers employed at the Trevose facility, the Employer also employs nine housecall technicians who visit bedridden patients in nursing homes and private homes to take specimens. Specimens are transported to the main laboratory either by drivers who have assigned routes or by the housecall technicians. Both the drivers and the housecall technicians drive the same type of company car.

Specimens brought to the laboratory are either delivered directly to the appropriate laboratory department or taken to the accessioning room where they are logged in by the driver and preprocessed for testing by employees classified as acces-

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propriate. In addition to the drivers assigned to the main laboratory and included in the unit sought by the Petitioner it appears from the record that there are full- and part-time drivers assigned to other locations to pick up and deliver specimens from other areas.

[3] We are not persuaded by this contention. As the legislative history of the health care amendments makes clear, the special provisions of the Act applicable to health care institutions relate to "patient care situations" and not to "purely administrative health care connected facilities." See 120 Cong. Rec. H4594 (daily ed. May 30, 1974); 120 Cong. Rec. S7310 (daily ed. May 7, 1974). We conclude that since testing human medical specimens does not involve patient care, the Employer is not a health care institution within the meaning of the amendments. See, *Damon Medical Laboratory, Inc.*, 234 NLRB No. 55 (1977).

sioners. When specimens are delivered directly to a laboratory department the driver and the laboratory technician working in the department are jointly responsible for unpacking the specimens.

After a specimen is tested the results may be telexed, telephoned, or sent by data point directly to the hospital or other customer. In less pressing cases, test results are delivered by a driver to the customers on his assigned route.

In addition to collecting specimens and delivering test results, drivers also deliver medical supplies used by customers for taking blood and other specimens. Each morning drivers go to the laboratory stockrooms where they pick up such supplies. Drivers also have occasion to enter the customer service area of the laboratory to check on customer orders for supplies and to discuss customer complaints or problems with customer service personnel.

Drivers are under the overall supervision of the Traffic and Materials Manager who also supervises phlebotomists, housecall technicians, and stockroom employees. Drivers enjoy the same fringe benefits as other employees including life insurance, vacation pay, pension plan, sick leave, and medical plan. All employees have access to an employee cafeteria and to an employee lounge. The same evaluation form is used for all employees. All nonexempt employees, including drivers, are paid on an hourly basis and on the same payroll. All employees assigned to the Trevose laboratory punch the same timeclock. No special training or educational background is required for employment as a driver or for several other employee classifications such as phlebotomist, stockroom employees, laboratory aide, or accessioner. Phlebotomists and stockroom employees, as well as drivers, are required to have valid drivers' licenses. The Employer posts all nonexempt vacancies and all employees are allowed to bid on vacancies. At least four employees currently working as drivers began their employment in other classifications.

The Board has found that a unit of drivers may be an appropriate unit for collective bargaining when it is established that the drivers comprise a distinct and homogeneous group who share a community of interest sufficiently different from that of other employees.[4] Consideration of all of the relevant factors in the instant proceeding demonstrates, however, that the drivers in issue here enjoy no such distinct community of interest as to warrant their separate representation.[5] Thus the record indicates that although drivers spend most of their time away from the main laboratory, they have frequent and varied work contacts with other classifications of employees including accessioners, laboratory assistants, stockroom employees, and customer service personnel. Not only do drivers share common benefits and conditions of employment with other laboratory employees but drivers are also grouped under the same supervision as several other classifications of employees. Furthermore, there is evidence of substantial overlap of job functions and responsibilities between drivers and other classifications of employees. For example, housecall technicians collect specimens and return them to the laboratory using company cars; laboratory employees other than drivers regularly deliver test results to customers; and stockroom employees using company vehicles regularly deliver medical supplies.

In light of these findings, and inasmuch as the Petitioner at the hearing disclaimed interest in representing drivers in any unit other than the one petitioned for, we shall order that the petition be dismissed.

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[4] See *Mc-Mor-Hon Trucking Co., Inc.*, 166 NLRB 700 (1967) and cases cited therein.

[5] Compare, *Damon Medical Laboratory, Inc., supra*. There a labor organization petitioned for a unit limited to drivers at one of the employer's laboratories located in Massachusetts. On review of the Regional Director's Decision and Direction of Election finding such a unit appropriate for collective bargaining, the Board ordered the petition dismissed.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

Dated, Washington, D.C. January 24, 1878

JOHN H. FANNING, *Chairman*
HOWARD JENKINS, JR. *Member*
BETTY SOUTHARD MURPHY, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

United States Court of Appeals
For the Third Circuit

INTERNAL OPERATING PROCEDURES

Effective: January 1, 1974
Revised: Effective March 1, 1974
2nd Revision: Effective September 1, 1978

CHAPTER VI

JUDGMENT ORDERS

A. Criteria.

A case may be terminated in this court by a judgment order:

1. Panel unanimity.

a. When the panel unanimously determines that a judgment of the district court or a decision of the United States Tax Court or a decision or order of an administrative agency should be affirmed or enforced and that a written opinion would have no precedential or institutional value; and

b. any one or more of the following circumstances is dispositive of a matter submitted for decision:

(1) That a judgment of the district court is based on findings of fact which are not clearly erroneous;

(2) That sufficient evidence supports a jury verdict;

(3) That substantial evidence on the record as a whole supports a decision or order of an administrative agency;

(4) That no error of law appears;

(5) That the appeal is a civil diversity case under 28 U.S.C. § 1332, the result of which does not turn

upon an interpretation of the Federal Rules of Civil Procedure or any Rules of Evidence for the United States District Courts and Magistrates;

(6) That the appeal is a criminal case which requires neither (a) a new interpretation of a federal statute, a Federal Rule of Criminal Procedure, or a rule or statute in evidence, or (b) a new interpretation of a rule of constitutional law applicable to criminal cases or a new rule of practice or procedure.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-188

In the Supreme Court of the United States

OCTOBER TERM, 1981

CENTER FOR LABORATORY MEDICINE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board abused its discretion in determining that the medical technologists and laboratory technicians at a medical test facility constitute an appropriate bargaining unit.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A-1) is not reported. The Board's decision and order (Pet. App. A-2 to A-11) are reported at 248 N.L.R.B. 728.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1981. The petition for a writ of certiorari was filed on July 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner operates a diagnostic medical facility at Trevose, Pennsylvania. Its medical technologists and laboratory technicians perform tests on human specimens—including, for example, skin, organ tissue, blood, and body fluids—sent to its facility by physicians, hospitals, clinics, and nursing homes. The technologists and technicians

interpret the test results and forward their analyses to petitioner's clients. At the time of the representation election involved here, petitioner also operated a diagnostic laboratory at a hospital in Springfield, Pennsylvania, the Tri-County Medical Center. Petitioner also operates seven "bleeding stations" in eastern Pennsylvania and southern New Jersey where phlebotomists draw blood and send samples by courier to petitioner's Trevose facility for testing. (App. A, *infra*, 2a-3a.)[1]

In June 1978, the United Food and Commercial Workers International Union, Local 1357 ("the Union") petitioned to represent only the laboratory technicians and medical technologists at the main facility in Trevose (App. A, *infra*, 2a; Pet. App. A-2 n.1). Petitioner opposed, arguing that it was a "health care institution" under Section 2(14) of the National Labor Relations Act (29 U.S.C. 152(14)) and that, therefore, the congressional admonition against the proliferation of bargaining units in health care institutions dictated that the only appropriate unit would include all of its employees.[2]

The Regional Director found that the unit sought by the Union was appropriate. More specifically, the Regional Director found that the laboratory technicians were "technical employees" because of their training and job responsibilities. (App. A, *infra*, 5a.) Relying on the established Board rule that "technical employees share a community of interest separate and distinct from other employees, and that a separate unit of technical employees is appropriate," the Regional Director found that the technicians comprised

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[1]The Regional Director's Decision and Direction of Election is reproduced as Appendix A to this brief.

[2]Alternatively, petitioner contended that if a separate technical employee unit were deemed appropriate, it should also include laboratory assistants, aides, and phlebotomists (App. A, *infra*, 5a n.10).

an appropriate unit (*ibid.*).[3] The Director further found that, although they were professional employees, the technologists work with the technicians and do virtually the same work (*id.* at 4a). He therefore concluded that the technologists could appropriately be included in the unit, if they so chose in a separate election (*id.* at 6a).[4]

The Regional Director excluded the technologists and technicians working at the Tri-County Medical Center from the unit on the ground that the hospital and petitioner had established working conditions at the hospital laboratory facility that were different from those at the Trevose facility (App. A, *infra*, 6a n.11): the "selection and retention of * * * personnel" who work at the hospital are subject to the approval of the Hospital; the employees at the hospital facility work under separate supervision; and there is no significant contact between petitioner's employees at the hospital and those at the Trevose facility.[5]

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[3]The Director found that neither the training nor the job responsibilities of laboratory assistants, aides, and phlebotomists made them technical employees, and he therefore excluded them from the unit (App. A, *infra*, 5a n.10).

[4]Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1), provides that professional employees may be included in a unit with non-professional employees only if a majority of professionals indicate that choice in an election. Accordingly, the Regional Director directed that the ballots of the technologists pose two questions: (1) Whether they desired to be included in a unit with technicians; and (2) whether they desired to be represented by the Union. The direction provided that if a majority of the technologists voted in favor of being included in the unit, then their votes on the second question would be combined with the votes of the technicians who were to be asked one question: Whether they desired to be represented by the Union. (App. A, *infra*, 7a-8a.)

[5]Following the election and the Regional Director's Supplemental Decision sustaining the challenges to the ballots cast by the laboratory employees at the hospital, the Humana Corporation moved to intervene in the proceedings and to have the case remanded to the Regional Director. In support of its motion, Humana stated that it had become the new owner of the Hospital, had cancelled the contract under which

The Regional Director also ruled that petitioner was not a health care institution, citing the Board's prior decision to that effect in another case involving petitioner. *Center for Laboratory Medicine, Inc., d/b/a Damon Medical Center*, 234 N.L.R.B. 387 (1978).

The Union won the ensuing representation election, and was certified as the representative of the technicians and technologists at the Trevose facility (Pet. App. A-2). Petitioner refused to bargain with the Union. The General Counsel filed a complaint charging petitioner with unfair labor practices and subsequently moved for summary judgment. The Board granted the motion on the ground that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (Pet. App. A-2 to A-11.) The court of appeals enforced the Board's order (Pet. App. A-1).

ARGUMENT

Petitioner contends that its facilities are "health care institutions" within the meaning of Section 2(14) of the Act (29 U.S.C. 152(14)).[6] There is no merit to this contention. Petitioner's facilities are not health care institutions, and, even if they were, the Board's unit determination would

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petitioner operated the Hospital's diagnostic laboratory, and had become the employer of the employees remaining in the diagnostic laboratory at the hospital, and therefore that the laboratory employees at the hospital should not be included in a unit with the other employees. Because it affirmed the Director's unit determination, the Board ruled that the issue raised by Humana's intervention motion was moot. (Apps. B & C, *infra*.)

[6]In 1974, Congress extended the coverage of the Act to previously exempt nonprofit hospitals (National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395, 29 U.S.C. 152 *et seq.*). Section 2(14) (29 U.S.C. 152(14)), which was added at that time, provides:

> The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility or other institution devoted to the care of sick, infirm, or aged person[s]."

nevertheless be appropriate. The decision of the court of appeals creates no conflict among the circuits. Review by this Court therefore is unwarranted.

The Board has determined that a facility must actually treat or have charge of patients, rather than merely provide medically related services to institutions that do have such responsibility, in order to qualify as a statutory health care institution. See *Damon Medical Laboratory, Inc.*, 234 N.L.R.B. 333, 334 n.1 (1978). The Board's conclusion is supported by the plain language of the statute and its legislative history.

Under Section 2(14), the term "health care institution" is specifically limited to institutions "devoted to the care of sick, infirm or aged person[s]." The plain language of this provision clearly indicates that the institution in question must have responsibility for the "care" of patients. All of the institutions specifically enumerated in Section 2(14) are responsible for patient care in the ordinary sense—that is, they have regular and substantial contact with patients and are physically responsible for their treatment or custody. Although the services of an independent diagnostic laboratory are important in the treatment of illness, the patient whose specimen is tested at a laboratory cannot be said to be under the supervision or care, or in the charge, of the laboratory. Such patients are under the care of the doctor who recommended that the specimen be taken, or in the care of the hospital, nursing home, or similar facility where the patient has been admitted.

The health care amendments are applicable to "health care institutions" generally and are not limited to the nonprofit hospitals that had previously been exempt from the Act's coverage. Congress intended that institutions responsible for patient care, such as convalescent homes and extended care facilities, would enjoy the protection afforded by the amendments, and that such protection would also

be available to institutions, such as health clinics, that administer health care to patients on an outpatient basis. Nothing whatever in the legislative history suggests that by broadening the "hospital" provision to include all "health care institutions" Congress intended to include all enterprises which provide medically-related services to hospitals. See *Laborers' International Union Local 1057* v. *NLRB*, 567 F. 2d 1006, 1011-1012 (D.C. Cir. 1977). Representative Thompson, a House manager of the bill, explained that "[w]hen we use the term [health care institution] we are looking to real patient care and health service delivery, whether inpatient or outpatient." 120 Cong. Rec. 16905 (1974); see S. Rep. No. 93-766, 93d Cong., 2d Sess. 3 (1974) (recognizing the special needs of patients *in* health care institutions). Petitioner does not administer to patients on either an inpatient or outpatient basis.

There is no merit to petitioner's contention (Pet. 8-9) that its facilities should be considered health care institutions because strikes by its workers would imperil the welfare of its clients' patients.[7] A principal objective of Congress in enacting the health care amendments was to confer bargaining rights upon employees of non-profit hospitals while at the same time insulating health care institutions to some extent from the impact of strikes. The Senate Report, explaining the proposed new Section 8(g), states that the "10-day [strike] notice is intended to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care." S. Rep. No. 93-766, *supra*, at 4. The purpose

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[7]Two courts have rejected this argument with respect to non-health care employees working at hospital premises. See *Laborers' International Union* v. *NLRB*, *supra*, 567 F. 2d at 1009-1015; *NLRB* v. *International Brotherhood of Electrical Workers Local 388*, 548 F. 2d 704 (7th Cir.), cert. denied, 434 U.S. 837 (1977).

of this limitation was to protect health care institutions from strikes called by their own employees—not to protect them from strikes called by employees of other employers doing business with health care institutions. Indeed, before passage of the health care amendments, enterprises that did business with non-profit hospitals from premises elsewhere were not exempt from the Act's coverage simply because the services they provided were necessary to the hospital's operations. See, *e.g.*, *American National Red Cross*, 211 N.L.R.B. 587 (1974) (supplier of blood).[8] Nothing in the history of the health care amendments suggests that Congress intended to overrule these decisions.[9]

Finally, even if petitioner were a "health care institution" (29 U.S.C. 152(14)), the bargaining unit approved by the Board would be appropriate. See, *e.g.*, *Barnert Memorial Hospital Center*, 217 N.L.R.B. 775, 776-777 (1975); *NLRB* v. *Sweetwater Hospital Association*, 604 F. 2d 454 (6th Cir. 1979).

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[8]In *American National Red Cross, supra*, the Board distinguished *Inter-County Blood Banks, Inc.*, 165 N.L.R.B. 252, 253 (1967) (Pet. 9 n.12), noting that in the latter case the blood banks were "intimately related" to non-profit hospitals because the hospitals provided free space to the banks and billed patients for the blood supplied, remitting the fees to the banks.

[9]Petitioner's reliance (Pet. 9-10) on the testimony of Senator Taft for the proposition that its facility at the hospital is a health care facility is misplaced. The point made by the Senator in the quoted testimony was that while an independent administrative health care facility (such as an insurance company) would not be covered, an administrative facility which was part of a hospital, such as its accounting office, would be covered. In any event, petitioner no longer operates the diagnostic laboratory at the Tri-County Medical Center (see page 3 note 5, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1981

DOJ-1981-10

APPENDIX A

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

CENTER FOR LABORATORY MEDICINE, INC.[1]

Employer

and Case No. 4-RC-13195

RETAIL CLERKS INTERNATIONAL UNION, LOCAL 1357

Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The hearing officer's ruling made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

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[1]The employer's name appears as amended at the hearing.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer operates a diagnostic medical laboratory at 3190 Tremont Avenue, Trevose, Pennsylvania. The employees at this facility test human specimens, interpret the results, and report them to the Employer's clients which include hospitals, nursing homes, clinics and physicians. The Employer also operates a laboratory at Tri-County Medical Center, Sproul and Thomson Roads. Springfield, Pennsylvania[2], and maintains seven bleeding stations at various locations in eastern Pennsylvania and southern New Jersey.

The Petitioner seeks to represent all technologists and technicians employed at the Trevose facility.[3] The Employer contends that, due to the functional integration of its operation, the only appropriate unit is one composed of all its employees.[4] There is no history of collective bargaining

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[2]At the hearing, the parties stipulated to the inclusion of the formal record in Case No. 4-RC-12704, *Center for Laboratory Medicine, Inc., d/b/a Damon Medical Center*, which contained evidence indicating that the Employer operates laboratories at approximately four other area hospitals under full service contract.

[3]The proposed unit includes technologists and technicians in the radio-immuno-assay, toxicology, electrophoresis, chemistry, endocrinology, multi-testing/SMAC, bacteriology, histology, cytology, serology, and hematology departments. The Petitioner has agreed alternatively that the appropriate unit might also include technologists and technicians working at Tri-County Medical Center and at the bleeding stations of the Employer and phlebotomists (also known as Patient/Client Service Representatives, Bleeders and housecall Technicians) and laboratory aides and assistants at all the Employer's locations.

[4]The Employer would include all technicians, technologists, laboratory aides, laboratory assistants, cytotechnologists, phlebotomists, customer relations employees, maintenance employees, accession employees accession employees, data point employees, Tel-X operators,

for any of the Employer's employees. In a prior case involving this Employer, the Board concluded that the Employer is not a health care institution.[5] The Trevose facility operates 24 hours a day, 7 days a week, although not every department works a 3-shift schedule. While some of the blood specimens are drawn by the Employer's phlebotomists[6] at Trevose, most of the specimens tested at Trevose (including blood, urine, feces, tissue and fluid specimens) are picked up by the Employer's drivers from its clients.[7] The drivers deliver the specimens to the accession area where employees classified as accessioners process the paperwork related to the specimens and insure distribution to the proper laboratory.

The staff of the laboratory departments include technologists, technicians, and laboratory assistants and aides. There are approximately 41 technologists, 84 technicians and 20 lab assistants employed at the Trevose facility.

The requirements for technologist and technician positions must meet certain standards established by various governmental regulatory authorities, such as HEW, FDA and some state agencies. The Employer divides both job classifications into three grade levels. The minimum requirement for a Technologist I is a B.S. or B.A. in a Life Science, plus one year of experience. The Technologist II position

---

stockroom employees, plant clericals, data processing employees, dispatchers, drivers, and lead drivers at the Trevose Laboratory, Tri-County Medical Center laboratory and the seven bleeding stations.

[5] *Center for Laboratory Medicine, Inc., d/b/a Damon Medical Center*, 234 NLRB No. 56.

[6] These employees draw blood specimens from patients' veins. The Employer will train a high school graduate for this position in approximately 20 hours.

[7] The record revealed that 60% of the specimens gathered at Tri-County Medical Center are sent to the Trevose facility for testing.

adds the requirement of registration with the American Society of Clinical Pathologists (ASCP), which is achieved by passing an examination. The Technologist III level requires additional experience. Technician I requires a high school diploma plus one year of experience in a medical laboratory. Technician II requires a two year Associate Degree plus one year general laboratory experience, or 2 years experience without the degree. Technician III requires a B.S. or B.A., or an Associate Degree plus 2 to 4 years general laboratory experience. Special ASCP registration is required of all Cytotechnologists and Histotechnologists.

Technologists and technicians work together and do essentially the same type of testing. However, the technologists, with their greater training, are more knowledgeable and will operate the more complex equipment or perform the more difficult tests. The technologists also must exercise judgment in checking test results to make sure they are valid and in checking controls that are required by governmental regulation.

Laboratory assistants are required only to have a high school diploma and normally perform only clerical and accessioning work. Only the lab assistants in the Toxicology and SMAC/Multi-testing departments perform basic specimen preparation.

There is a supervisor and a group leader in each of the laboratory departments except electropheresis and endocrinology where there is only a group leader.[8] Four technical directors are responsible for all the laboratory departments at Trevose. These directors report to Dr. Herowit, Medical Director of Affairs, and to Charles Schmiewski, General Manager.

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[8]The parties stipulated that the supervisors are supervisors within the meaning of Section 2(11) of the Act, and that the group leaders are not supervisors.

The Employer emphasizes that all of its employees are hourly paid, receive the same benefits and privileges, and are subject to the same employment policies, one of which is open bidding on available jobs. There are currently technicians who formerly held other positions with the Employer. However, to become a technician, one must fulfill the education and experience requirements indicated above. The Employer also has approximately 8 phlebotomists who are trained technicians, but prefer client service work to laboratory work.

The Board has consistently held that technical employees share a community of interest separate and distinct from other employees, and that a separate unit of technical employees is appropriate.[9] The Petitioner seeks a unit of technical employees at the Employer's Trevose facility. The Employer contends that none of its employees are technicals. Based on the record evidence which establishes that the technicians have specialized education and training which is required by governmental regulation, I find that the technicians are technical employees and as such constitute an appropriate unit for the purposes of collective bargaining.[10] *Barnert Memorial Hospital Center*, 217 NLRB 775; *Jewish Hospital of Cincinnati*, 223 NLRB 614; *Pontiac Ostepathic Hospital*, 227 NLRB 1706.

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[9] *Meramec Mining Company*, 134 NLRB 1675; *The Sheffield Corporation*, 134 NLRB 1101; *Georgetown University*, 200 NLRB 215; *Barnert Memorial Hospital Center*, 217 NLRB 775; *Children's Hospital of Pittsburgh*, 222 NLRB 588, *Pontiac Osteopathic Hospital*, 227 NLRB 1706.

[10] Alternatively, the Employer argues that its phlebotomists, laboratory aids and assistants, as well as its technologists and technicians are technical employees. In view of the fact that a high school graduate can be trained in less than a week to do phlebotomy work, I find that the Employer's phlebotomists are not technical employees. Likewise, I find that the laboratory aids and assistants are not technical employees as they have no specialized training and perform only simple routine procedures.

Although the issue as to whether the technologists are professional employees was not raised at the hearing nor in the parties' briefs, this issue must be considered because of the provisions of Section 9(b)(1) of the Act. The Board has held that, in view of the advanced educational requirements, the registration by the American Society of Clinical Pathologists and the responsibility involved in the work performed, medical technologists are professional employees within the meaning of Section 2(1) of the Act. See *Barnert Memorial Hospital Center, supra.* The record evidence in the instant case shows that the Employer's technologists meet the requirements for professional employees. Accordingly, I find that the Employer's technologists are professional employees within the meaning of Section 2(12) of the Act who may constitute a separate bargaining unit, and may not be included in a unit with the technicians without a self-determination election. Accordingly I find that the following employees may constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[11]

---

[11]I find no merit to the Employer's contention that the only appropriate unit must include employees at the Employer's Tri-County Medical Center laboratory. There are 7 technologists, 6 technicians and 1 laboratory aid employed at the Tri-County Medical Center laboratory. The Employer operates the laboratory at Tri-County Medical Center pursuant to a "Laboratory and Pathology Service Agreement." The laboratory must be maintained in accordance with the Medical Center's standards. The laboratory employees must comply with the Medical Center's rules and the Medical Center retains the right of approval over the selection and retention of all the Employer's laboratory personnel. The laboratory is supervised by Mr. Southland who reports to Mr. Lipton, the Hospital Service Manager. The record reveals that one technologist has permanently transferred from Trevose to the Medical Center's laboratory. However, the record fails to indicate that there have been any temporary transfers of technicians and technologists between the two facilities. The record establishes that the Medical Center laboratory employees have separate supervision, different working conditions, and have only limited contact with the technicians and technologists at Trevose.

All technologists and technicians employed at the Employer's laboratory in Trevose, Pennsylvania and excluding all other professional and non-professional employees, guards and supervisors as defined in the Act.

The unit set out above includes professional and non-professional employees. However, the Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with employees who are not professional unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, I must ascertain the desires of the professional employees, the technologists, as to their inclusion in a unit with non-professional employees, the technicians.

I shall therefore direct separate elections in the following voting groups:

Voting group (a):

All technicians at the Employer's Laboratory in Trevose, Pennsylvania but excluding all other professional and non-professional employees, guards and supervisors as defined in the Act.

Voting group (b):

All technologists at the Employer's Laboratory in Trevose, Pennsylvania but excluding all other professional and non-professional employees, guards and supervisors as defined in the Act.

The employees in the non-professional voting group (a) will be polled to determine whether or not they wish to be represented by the Union.

The employees in voting group (b) will be asked two questions on their ballot:

(1) Do you desire the technologists to be included with the technicians in a unit composed of all technologists and technicians at the Employer's Trevose, Pennsylvania Laboratory?

(2) Do you desire to be represented for the purpose of collective bargaining by Retail Clerks International Union, Local 1357?

If a majority of the technologists vote "Yes" to the first question, indicating their wish to be included in a unit with the technicians, they will be so included. Their votes on the second question will then be counted together with the votes of the technicians to decide the representative for the overall technologist and technician unit. If, on the other hand, a majority of the technologists vote against inclusion, they will not be included with the technicians. Their votes on the second question will then be separately counted to decide whether they wish the Petitioner to represent them in a separate unit. The votes of the technicians will, also be separately counted to decide whether they wish the Petitioner to represent them in a separate unit. The Petitioner has not indicated on the record that it is unwilling to represent the technologists and technicians separately if the technologists vote for separate representation. However, if the Petitioner does not desire to represent the technologists and technicians in separate units even if those employees vote for such representation, it may notify the Region to that effect within ten days of the date of this Decision and Direction of Elections.

My unit determination is based, in part, then, upon the results of the election among the technologists. However, I now make the following findings in regard to the appropriate unit:

All technologists and technicians at the Employer's Laboratory in Trevose, Pennsylvania and excluding all

other professional and nonprofessional employees, guards, and supervisors as defined in the Act.

(2) If a majority of the technologists do not vote for inclusion in the unit with the technicians, I find that the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining with the meaning of Section 9(b) of the Act.

(a) All technicians at the Employer's Laboratory in Trevose, Pennsylvania and excluding all other professional and nonprofessional employees, guards, and supervisors as defined in the Act.

(b) All technologists at the Employer's Laboratory in Trevose, Pennsylvania and excluding all other professional and nonprofessional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTIONS[12]

Elections by secret ballot will be conducted by the undersigned Regional Director among the employees in the units found appropriate at the time and place set forth in the notice of elections to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at

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[12]Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by October 5, 1978.

the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[13] The technicians shall vote whether (or not) they desire to be represented for collective bargaining purposes by Retail Clerks International Union, Local 1357. The technologists shall vote whether (or not) they

(1) desire the technologists to be included with the technicians in a unit composed of all technologists and technicians at the Employer's Trevose, Pennsylvania Laboratory, and whether (or not) they

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[13]In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwater, Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 294 U.S. 759; decided April 23, 1969. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Elections. The Regional Director shall make the list available to all parties to the elections. In order to be timely filed such a list must be received in the Regional Office, Suite 4400, William J. Green, Jr. Federal Building, 600 Arch Street, Philadelphia, Pennsylvania 19106 on or before September 29, 1978. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

(2) desire to be represented for the purposes of collective bargaining by Retail Clerks International Union, Local 1357.

/s/ Peter W. Hirsch

PETER W. HIRSCH, Regional Director for the Fourth Region

Dated: September 22, 1978
at Philadelphia, Pennsylvania

APPENDIX B

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CENTER FOR LABORATORY MEDICINE, INC.

Employer

and Case No. 4-RC-13195

RETAIL CLERKS INTERNATIONAL UNION, LOCAL 1357

Petitioner

* * * * * *

MOTION TO INTERVENE AND FOR REMAND

The undersigned Humana, Inc., hereinafter called "Humana" hereby moves the Board to allow it to intervene in the above matter as an employer or otherwise, and for the Board to remand the case for further hearings in connection with the instant matter for the reasons set out below:

1. All facts already in the record herein are incorporated hereby in reference.

2. On or about September 27, 1978, title to Tri County Medical Center was conveyed by a subsidiary of American Medicorp, Inc., a Pennsylvania corporation, to Humana in fulfillment of and in connection with acquisition by Humana of a controlling interest in the issued and outstanding stock of American Medicorp, Inc. Humana is now the holder of legal title to and operator of Tri County Medical Center.

3. Until a date subsequent to December 6, 1978, Humana had no notice of the instant proceeding.

4. If the Board finds contrary to the findings of Peter W. Hirsch, Regional Director of the Fourth Region, herein dated September 22, 1978 and December 6, 1978 that employees of Tri County should be included in the bargaining unit (units) to which his Decision and Direction of Election dated September 22, 1978 relates and to which his Supplemental Decision on Challenged Ballots dated December 6, 1978 relates, employees of Humana may, as a result of said proceedings in which Humana did not participate, become represented by Retail Clerks International Union Local 1357 (the Union).

5. Pursuant to communications between Humana and Center for Laboratory Medicine, Inc. (the Employer), all economic relationships between the Employer and Humana will terminate March 31, 1979, and after said date, the Employer will have no connection with or management of any laboratory and pathology facility at Tri County Medical Center. Subsequent to March 31, 1979, previous employees of the Employer may or may not become employees of Humana.

6. The only reason propounded by any party in the proceeding for including laboratory and pathology employees at Tri County within one or more bargaining units of the Employer is their former series of interrelationships as employees of the Employer and the resultant previous community of interest (if any) with other employees of the Employer. If Humana had received notice of and been given the opportunity to participate in the instant proceedings, it would have introduced evidence that (a) prior to the election, at the time of the election and thereafter the laboratory and pathology employees of Tri County had no reasonable expectation of continuing as employees of the Employer and that they should not have voted for such reason, and that (b) there was no reasonable expectation, because of the

termination of the business arrangement between Tri County and the Employer on March 31, 1979, that whatever community of interest existed between the subject employees at Tri County and the other employees of the Employer would continue into the foreseeable future.

7. The former employees of the Employer who remain at Tri County after March 31, 1979 will not constitute all of the technical employees of Tri County after such date and, therefore, any unit consisting of such employees will not be an appropriate unit. (See cases cited on footnote 9, Decision and Direction of Elections dated September 22, 1978.)

8. If Humana is permitted to intervene herein and if the instant matter is remanded for further hearings, Humana will introduce facts establishing the correctness of the statements of fact contained herein. If Humana is not allowed to intervene herein and is not allowed to establish said facts and if the Board, on review, overrules the Decisions of the Regional Director below that the Tri County employees are not properly includable, (a) the Board will have certified an inappropriate unit at Tri County (which does not include all technical employees), (b) allowed to be definitive of the interests of employees a non existent business relationship between Tri County and the Employer, and (c) counted in the election the votes of employees who had no reasonable expectation of continued employment by the Employer.

Respectfully submitted.

/s/ John S. Greenebaum

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CERTIFICATE OF SERVICE

I certify that a copy of the above Motion To Intervene And For Remand has been sent via United States mail to Peter W. Hirsch, Regional Director, National Labor Relations Board, Region 4, Suite 4400, William J. Green, Jr. Federal Building, 600 Arch Street, Philadelphia, Pa. 19106; Murray S. Freeman, Esquire, Nutter, McClennan & Fish, Federal Reserve Plaza, 600 Atlantic Avenue, Boston, Mass. 02210; Retail Clerks International Union Local 1357, 210 East Courtland Street, Philadelphia, Pa. 19120.

Dated this 12th day of March, 1979.

/s/ John S. Greenebaum

John S. Greenebaum

APPENDIX C

NLRB - ORDER SECTION

8/10/79 - 12:30 pm

/ FANNING/JENKINS/MURRAY/pm

49326

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RE: CENTER FOR LABORATORY MEDICINE, INC., 4-RC-13195. BY TELEGRAPHIC ORDER DATED JANUARY 29, 1979, THE NATIONAL LABOR RELATIONS BOARD GRANTED THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION ON CHALLENGED BALLOTS. HAVING DULY CONSIDERED THE ENTIRE RECORD, THE BOARD HEREBY AFFIRMS THE DECISION OF THE REGIONAL DIRECTOR THAT A UNIT LIMITED TO EMPLOYEES AT EMPLOYER'S TREVOSE, PENNSYLVANIA LOCATION IS APPROPRIATE.

THE BOARD FINDS IT UNNECESSARY TO RULE ON THE MOTION TO INTERVENE FILED ON BEHALF OF HUMANA, INC., SINCE, IN VIEW OF THE BOARD'S AFFIRMANCE, THE ISSUES RAISED BY THE MOTION ARE MOOT.

ACCORDINGLY, THE CASE IS REMANDED TO THE REGIONAL DIRECTOR FOR FURTHER APPROPRIATE ACTION PURSUANT TO THE BOARD'S RULES AND REGULATIONS. DATED, WASHINGTON, D.C., AUGUST 10, 1979. JOHN H. FANNING, CHAIRMAN; HOWARD JENKINS, JR., MEMBER; BETTY SOUTHARD MURRAY, MEMBER

Petitioner's Reply Brief

Office-Supreme Court, U
FILED
OCT 21 1981
ALEXANDER L. STEVAS
CLERK

No. 81-188

In the Supreme Court of the United States

OCTOBER TERM, 1981

CENTER FOR LABORATORY MEDICINE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-188

CENTER FOR LABORATORY MEDICINE, INC.,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

Introduction

In its brief in opposition (Opp. Br. 5) the National Labor Relations Board ("Respondent" or the "Board") stated that "the decision of the court of appeals [in the case at bar] creates no conflict among the circuits." The Board, however, may have been unaware that on October 1, 1981, at the time it was finalizing its brief, the United States Court of Appeals for the Seventh Circuit rendered a decision in the case of *North Suburban Blood Center* v. *NLRB*[1], No. 80-2273, (7th Cir. October 1, 1981) which, petitioner submits, directly conflicts with that in the case at bar with respect to an important issue of national labor law: the appli-

[1] In its petition for a writ of certiorari the Center for Laboratory Medicine, Inc. ("Petitioner" or the "Center") had alerted this Court and the Board to the possible conflict among the circuits posed by this pending Seventh Circuit case (Pet. 5, n.6).

cation of the term "health care institution" under Section 2(14) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. § 152(14), to facilities providing medically-related services to hospitals, clinics and the like.[2]

The Seventh Circuit's opinion is not yet reported, and a copy thereof is appended hereto.[3]

Argument

Petitioner respectfully submits that the decision of the Seventh Circuit in *North Suburban Blood Center, supra*, creates a conflict with the order and judgment of the United States Court of Appeals for the Third Circuit in the instant case concerning an important area of national labor law and thus presents an additional reason to warrant this Court's exercise of certiorari jurisdiction.[4]

In *North Suburban Blood Center*, NSBC, a nonprofit blood center serving 13 hospitals in the metropolitan Chicago area, petitioned the Seventh Circuit to set aside an order of the Board finding that it had violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5), by refusing to bargain with the union certified as the collective bargaining representative of its full and

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[2] Section 2(14), 29 U.S.C. § 152(14), provides that:

> (14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons.

[3] Unless otherwise specified, all appendix citations refer to the appendix contained in petitioner's reply brief.

[4] Although the Seventh Circuit (App. A-11, n.10) saw no need to address the propriety of the Board's findings in *Boston Medical Laboratory, Inc.*, 235 NLRB 1271, 1271, n.2 (1978), *Damon Medical Laboratory, Inc.*, 234 NLRB 333, 334, n.1 (1978) and *Center for Laboratory Medicine, Inc.*, 234 NLRB 387, 387, n.3 (1978) that the testing of human medical specimens did not involve patient care for purposes of coverage under the 1974 health care amendments, it is clear, as discussed *infra*, that the Board's and, by implicit endorsement, the Third Circuit's (Pet. 6, n.8) test for resolving the status of a facility — whether it be a blood bank or a diagnostic laboratory — as a "health care institution" conflicts with that applied by the Seventh Circuit. Moreover, as discussed *infra*, it is readily apparent that the services provided by the Center are as, if not more, intimately connected to patient care than those provided by the North Suburban Blood Center ("NSBC"), and hence the Seventh Circuit would likely have drawn a different conclusion than the Third Circuit if confronted with the health care status of the Center.

regular part-time distribution driver and dispatch employees and directing it to bargain with the union (App. A-1). The Board cross-applied for enforcement of its order. *Id.*

NSBC based its refusal to bargain on the alleged underlying inappropriateness of the certification of the union as the exclusive representative of its driver and dispatch employees. It contended that it was a "health care institution" under Section 2(14) of the Act and that the Board's unit definition was thus inappropriate because it was not made in light of a Congressional directive to avoid undue proliferation of bargaining units in health care institutions (App. A-2).

The Seventh Circuit held, contrary to the Board, that NSBC was a "health care institution" and accordingly set aside the Board's order and directed it to follow the Congressional anti-proliferation directive when considering the appropriate unit in any further proceedings (App. A-12).[5]

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[5] In the instant case the Board takes the position that even if the Center were a "health care institution", it would nonetheless find the unit of technicians and technologists at the Trevose facility appropriate (Opp. Br. 7). It should first be stressed that this position never appeared as an articulated basis for the agency's decision but merely constituted the "*post hoc* rationalization" of the Board's appellate counsel and accordingly had to be ignored. *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 443-444 (1965). At any rate, the Board's argument ignores its function in unit determinations involving health care institutions — which is to weigh the Congressional directive against unit proliferation on a case-by-case basis rather than to apply traditional community of interest analysis in a mechanical fashion; failure to address the Congressional directive is *per se* "fatal" to the Board's application for enforcement. *Mary Thompson Hospital, Inc.* v. *NLRB*, 621 F.2d 858, 863 (7th Cir. 1980); *Allegheny General Hospital* v. *NLRB*, 608 F.2d 965 (3d Cir. 1979); *St. Vincent's Hospital* v. *NLRB*, 567 F.2d 588 (3d Cir. 1977). The Board in this case admittedly has given *no* consideration to the Congressional directive; no consideration is clearly not a substitute for "due" consideration. *Id. See also, NLRB* v. *West Suburban Hospital*, 570 F.2d 213, 216 (7th Cir. 1978) where the Seventh Circuit rejected the Board's unit determination as violative of the Congressional directive in view of the fact that it had given "mere lip-service mention of the Congressional admonition as a factor to be taken into account, without any indication . . . as to the manner in which its unit determination . . . implemented or reflected that admonition." Moreover, the Sixth Circuit, which the Board cites in support of its position, has, like the other courts of appeal, in fact been careful to distinguish due consideration from "lip service" or no consideration and in *Bay Medical Center, Inc.* v. *NLRB*, 588 F.2d 1174 (6th Cir. 1978), *cert. denied*, 444 U.S. 827 (1979), after pointing out that *St. Vincent's* and *West Suburban Hospital* involved the latter, concluded that,

In reaching this result the court noted that the legislative history indicated that the "crucial factor in the definition of health care institutions is patient welfare" (App. A-9) and accordingly concluded that the health care institution issue should be resolved on the basis of whether a facility's services were "integrally related" to patient care and whether "in fact a disruption in [its]services would seriously impair patient welfare." (App. A-10.) The court rejected the Board's contention — which it has likewise made in the instant case (Opp. Br. 5-6) — that the nexus to "patient care" can be answered simply on the basis of the isolation of the facility from other hospitals[6] or the absence of general treatment and custody of patients on the facility's premises. *Id.*[7]

The court found that the record below amply established NSBC's "patient care", especially since its employees were in-

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"Here, the NLRB's determination not to include LPN's in a bargaining unit of technical employees was a *considered decision in which the Board balanced the policy against undue proliferation of bargaining units with the policy against disrupting existing bargaining relationships* . . . ." 588 F.2d at 178 (emphasis added).

[6] In *North Suburban Blood Center* and in the instant case (Opp. Br. 5-6) the Board's requirement that patient care physically occur at the facility in question in order for it to acquire "health care institution" status seriously "sidesteps" the purpose of the Act's amendments, which is to avoid disrupting the unimpeded delivery of health care services:

> The Board's requirement that patient care physically occur *at* the Glenview facility, in any event, sidesteps the purpose of the Act's amendments. The legislative history [*See* App. A-9] indicates that geographical proximity may convert a purely administrative facility into a health case facility if located *within* a hospital because then "there would be a connection directly and indirectly with ongoing patient care." But the converse does not necessarily follow. The fact that NSBC is located apart from any one hospital, precisely because it is designed to serve thirteen hospitals, cannot *a fortiori* deprive it of health care institution status if the Center is in fact integrally related to patient care and not purely administrative. The fact that patients are not generally treated at the facility does not itself mean that the Center is purely administrative if in fact a disruption in services would seriously impair patient welfare, the central concern of the amendments. (App. A-10) (citations omitted).

[7] The Board in fact has consistently analyzed the health care institution issue with respect to blood banks and diagnostic laboratories in a similar perfunctory manner overlooking the purpose of the health care amendments. In *San Diego Blood Bank*, 219 NLRB 116 (1975), the Board concluded:

volved in diagnostic testing of patient specimens, consulting with other physicians, administering "therapeutic phlebotomies" and treating donors experiencing complications (App. A-3-4).

Under the court's analysis it seems clear that the Center's activities would likewise be deemed sufficiently integrated with patient care to establish its status as a "health care institution". Those types of "patient care" services highlighted in *North Suburban Blood Center* comprised only a portion of NSBC's activities as it was also involved in recruiting donors and processing and distributing blood (App. A-3, 8). The Center, by contrast, is devoted *exclusively* to performing tests on human medical specimens and analyzing those test results in order to assist hospitals, nursing homes, clinics and physicians in the diagnosis of disease and illness and the treatment of patients (Pet. 3, 8-9). Moreover, the Center's testing and consultation often occur in life-threatening circumstances when the patient is actually on the operating table. *Id.*[8] In addition, Center employees regularly visit

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> We also find that the Employer is not a health care institution within the meaning of the 1974 amendments. The legislative history makes it clear that the special provisions of the Act applicable to health care institutions relate to "patient care situations" and not "purely administrative health connected facilities." Since supplying blood to hospitals obviously does not involve patient care, blood banks are not health care institutions within the meaning of the amendments. 219 NLRB at 116, n.17 (citations omitted).

And, in *Center for Laboratory Medicine, Inc.*, 234 NLRB 387, 387, n .3 (1978) (Pet. App. A-14, n.3), the Board merely substitutes "testing human medical specimens" for "supplying blood to hospitals":

> As the legislative history of the health care amendments makes clear, the special provisions of the Act applicable to health care institutions relate to "patient care situations" and not to "purely administrative health care facilities". We conclude that since testing human medical specimens does not involve patient care, the Employer is not a health care institution within the meaning of the amendments (citation omitted).

The Seventh Circuit quickly dispensed with this type of reasoning as showing that the "Board's superficial analysis in those cases illustrates its disregard for Congress' concern to promote stability in patient care delivery through the 1974 amendments." (App. A-8.)

[8] By contrast, the court in *North Suburban Blood Center* had to "envision situations where the donor's operation has to be performed in the immediate future." (App. A-10.)

patients to extract specimens and deliver the same for testing at its Trevose facility. *Ibid.*

In particular, the Center emphasized its relationship with the Tri-County Medical Center to illustrate the patient-related aspects of its services in several respects: its laboratory facility at Tri-County was the sole facility at that hospital; the Center contracted with Tri-County to provide a duly qualified and licensed pathologist who, in many cases, was required to conduct tests while the patient was on the operating table and to make diagnoses at critical moments during surgery; and its employees often visited Tri-County patients to draw specimens for testing. (Pet. 3-4, 10-11).

In its brief in opposition the Board, by noting that a subsequent change in ownership ultimately led to the cancellation of the Center's contractual relationship with Tri-County, has created the misleading impression that the patient-related aspects of the Center's Tri-County services comprised a minor and unique portion of its overall operations (Opp. Br. 3, n.5). In fact, as noted above, the Center, apart from its work at Tri-County, devoted the remainder of its time exclusively to testing human medical specimens and transmitting its interpretations of the results of those tests to a number of other hospitals, nursing homes, clinics and physicians, to assist them in the diagnosis of illness and disease and the treatment of patients. More importantly, the Board ignores the fact that the record in this case revealed the fact that the Center had several full service contracts with other area hospitals similar to that it had with Tri-County. Indeed, the Regional Director in his Decision and Direction of Election, which is reproduced as Appendix A in the Board's brief in opposition, states, in a footnote to his description of the Center's operation at Tri-County, that the "parties stipulated to the inclusion of the formal record [in an earlier representation proceeding involving the Center], which contained evidence indicating that the Employer *operates laboratories at approximately four other area hospitals under full service contract.*" (Opp. Br. App. A. 2a, n.2) (Emphasis

added). At any rate, the crucial moment for determining the appropriateness of a unit is when the election is held, not at a later date when corporate changes in the employer's operations may have transpired. *Cf. Stouffer's Cincinnati Inn*, 225 NLRB 1196 (1976); *Cardinal Timothy Manning*, 223 NLRB 1218 (1976).[9]

In summary, petitioner respectfully submits that the services that it provides to, *inter alia*, hospitals and surgeons are at least, if not more, directly related and essential to patient welfare than those of NSBC. A strike called by a union without any notice (which would be permitted under the decision of the Board and the order and judgment of the Third Circuit) would in the words of the *North Suburban* court "seriously impair patient welfare." (App. A-10.) It requires little imagination to foresee the effects on the welfare of patients at any one of the several hospitals for which the Center provides exclusive diagnostic testing services should its technicians and technologists go on strike seconds before a specimen from a patient being operated on is due to be tested to determine whether more radical surgery is required.[10] Clearly, such a strike could impair the lives of patients.

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[9] Moreover, the Board's argument in this regard has not been raised in any of the prior proceedings in this case and thus should not be accepted by this Court as it constitutes a "*post hoc* rationalization" for agency action. *NLRB* v. *Metropolitan Life Insurance Company*, *supra*.

[10] As noted by the Seventh Circuit, the services of NBSC (and, it is submitted, those of a diagnostic laboratory — *See* Pet. 8-9) are noninventoriable unlike those of a pharmaceutical supplier or hospital laundry (App. A-10). In this regard it should be noted that the Board's reliance (Opp. Br. 6) on *Laborers' International Union* v. *NLRB*, 587 F.2d 1006 (D.C. Cir. 1979) and *NLRB* v. *International Brotherhood of Electrical Workers, Local 388*, 548 F.2d 704 (7th Cir.) *cert. denied*, 434 U.S. 837 (1977) is misplaced as those cases involved entitites — electrical and construction contractors — that clearly did not provide "patient care" or services necessary to patient treatment. Those cases did not address the threshold health care institution issue but rather the separate question of whether Section 8(g) of the Act, 29 U.S.C. § 158(g), which requires ten day notices to be filed by "a labor organization . . . engaging in any strike, picketing, or other concerted re-

Conclusion

For the foregoing reasons and those expressed in its petition for certiorari, it is respectfully submitted that the order and judgment of the Third Circuit in the case at bar is in conflict with the decision of the Seventh Circuit in *North Suburban Blood Center* and raises an important issue of national labor law. Petitioner therefore prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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Dated: October 19, 1981

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fusal to work *at* any health care institution" (emphasis added) could cover a clearly non-health care entity on the ground that the word "at" referred to the location of the labor activity with reference to the health care institution's property so that "any strikes, picketing, etc., occurring on the premises of the institution by any union . . . should be covered." 548 F.2d at 707. Both courts answered this question in the negative.

APPENDIX

United States Court of Appeals
For the Seventh Circuit

No. 80-2273

NORTH SUBURBAN BLOOD CENTER,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

No. 13-CA-19881

ARGUED JUNE 4, 1981 — DECIDED OCTOBER 1, 1981

Before PELL and SPRECHER, *Circuit Judges*, and EAST, *Senior District Judge.**

PELL, *Circuit Judge*. North Suburban Blood Center (NSBC or Center) has petitioned this court, pursuant to 29 U.S.C. § 160(f), to review and set aside an order of the National Labor Relations Board (Board or NLRB) which determined that the Center had violated 29 U.S.C. §§ 158(a)(1) and (5) by refusing to bargain with the union certified as the collective bargaining representative of the petitioner's full and regular part-time distribution driver and dispatch employees,[1] and directed the Center to bargain with the union. The Board has cross-applied for enforcement of its order.

* William G. East, Senior District Judge for the District of Oregon, is sitting by designation.

[1] The Board's Decision and Order is reported at 251 N.L.R.B. No. 98 (1980). This decision was based upon findings made by the Board's Regional Director in the prior representation hearing.

The union sought certification as the exclusive bargaining representative of NSBC's driver and dispatch employees pursuant to 29 U.S.C. § 159(c). At the representation hearing before the Board's Regional Director, the Center objected to this unit definition as contrary to a Congressional directive to avoid undue proliferation of bargaining units in health care institutions. The Regional Director rejected NSBC's contention and determined that the Center was not a health care institution under § 152(14) of the Act. On that basis, he refused to apply considerations regarding the proliferation of bargaining units and directed an election. Ultimately, after the election, the Regional Director certified the union as the exclusive bargaining representative of the Center's drivers and dispatchers. After the Center refused to bargain, the union filed the unfair labor practice charges here at issue. The sole question decided in this appeal is whether the North Suburban Blood Center is a health care institution within the meaning of 29 U.S.C. § 152(14).[2]

The Nature of the Employer's Business

The North Suburban Blood Center is a nonprofit entity formed by thirteen hospitals in Chicago's north and northwest suburbs to meet the total blood requirements of the participating hospitals. NSBC represents the consolidation of the internal blood bank operations of the hospitals which established the Center with their own funds to serve more efficiently and economically the blood needs of all of the hospitals jointly. Soon after NSBC was established, it was incorporated as a separate nonprofit organization, but it still retains organizational connections with the thirteen hospitals. The Center's Board of Directors is comprised of a hospital administrator or physician of each individual hospital, and a blood bank director or pathologist from each hospital serves

[2] Because of our disposition of the case we need not address the disputed issue of the propriety of the Board's inclusion of on-call drivers in the bargaining unit.

on NSBC's Medical Advisory Board. The president and medical director of the Center is a physician licensed in Illinois and certified by the American Board of Pathology.

Donor recruiting and blood collection, processing, storage, inventory control, and distribution, previously performed separately by each hospital, are now consolidated into a unified operation carried out by the NSBC. The Center obtains blood from donors at its own facility located in Glenview, Illinois, at hospital facilities it uses,[3] or through exchange agreements with blood banks serving other hospitals. In addition to acquiring blood, the Center purchases blood-related supplies in bulk for the hospitals.

The Center maintains laboratories for testing, processing, and preparing blood at the Glenview facility. In addition, the Center's administrative vice-president, Dan Connor, testified that NSBC operates a reference and consultation laboratory to which the hospitals can send problem cases when "they want to cross-match [blood] . . . and for whatever reason they have difficulty having the cross-matching compatible because the donor or the patient may have some irregular antibodies because of the previous transfusions. . . . [At the reference laboratory] we screen it against various known antiserums and then screen the donor for blood to come up with compatible blood for that patient that will not result in a transfusion reaction."

Other functions performed by the Center include diagnostic testing of patient specimens, consultation by the Center's Medical Director with physicians regarding particular patients, and the provision of blood and blood products for specific patients when requested by a physician from one of the hospitals. The Center can perform a plasma extraction

[3] Some of the hospitals have not retained any blood donor facilities on premises. Others maintain space for the Center's use, but NSBC provides its own equipment and staff. Still other hospitals use their own facilities and staff, but operate under the ultimate direction of the Center.

procedure known as "plasma freeze."[4] Center employees also draw blood from "autologous" donors — those who come to have blood drawn for their own use, such as persons with rare blood types whose blood is extracted for their own future surgery. In addition, some people come to the Center for "therapeutic phlebotomies," which involve the removal of excess red blood cells, at the order of their attending physicians. In these cases, the blood removed is not used for later transfusions. Such donors are really receiving treatment as patients, although these treatments constitute a very small percentage of the Center's overall activity. Finally, NSBC's medical director treats any donors experiencing complications at the Center.

Status of Health Care Institutions Under the Act

Prior to the 1974 amendments to the National Labor Relations Act (Act), nonprofit hospitals were explicitly exempted by § 152(2) from the Act's definition of "employers" subject to the Act's coverage. Although blood banks were not statutorily exempt from the Act, the Board occasionally had declined to assert jurisdiction over blood banks when it determined that the blood bank was "intimately related" to the patient care at the exempt hospitals.[5] In 1974, Congress removed the nonprofit hospital exemption from § 152(2) and added a new

[4] This procedure involves extracting a person's blood, which is then centrifuged to separate the blood elements — white and red blood cells, plasma, and platelets. Depending upon the needs of the person, some portion of the blood is removed and the rest returned. The entire process consumes from one to three hours.

[5] In *Inter-County Blood Banks, Inc.*, 165 N.L.R.B. 252 (1967), the Board declined to assert jurisdiction over a blood bank which primarily serviced nonprofit hospitals then exempt from the Act because it found, under the particular facts of the case, that the employer's operations were "intimately related to the operations of the hospitals to which it supplies blood for the treatment of patients . . . ." *Id.* at 253. There, the blood bank maintained 13 donor centers most of which were located in hospitals served by the blood bank. The hospitals supplied the space at no charge, but the blood bank operated the donor centers with its own equipment and staff. In *American National Red Cross*, 211 N.L.R.B. 587 (1974), however, the Board asserted

subsection 152(14), which reads: "The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons." Although nonprofit hospitals now are subject to the Act's coverage as health care institutions, a determination that an entity is a health care institution requires unions of those organizations to abide by particular provisions added to the Act in 1974 designed to minimize disruption of patient care services.[8] Additionally, if the petitioner is found to be a health care institution, the Board must abide by a Congressional directive that

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes

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jurisdiction where the operation of the employer's blood program occurred off the hospitals' premises and served both exempt and nonexempt hospitals. The Board found that the employer's operations were unlike those found intimately connected with exempt hospitals in *Inter-County*. We express no opinion as to the appropriateness of such findings under prior law or under the 1974 amendments, but only cite these examples to illustrate the status of blood banks under Board decisions prior to the 1974 amendments to the Act.

[8] A proviso to Section 158(d) pertaining to bargaining for a new contract where a previous contract is in effect but about to expire contains notice requirements which are increased by thirty days for health care institutions. This section also extends the period during which strikes and lockouts are prohibited by 30 additional days for health care institutions. Finally, when bargaining for an initial contract, parties to a dispute must participate in state and federal mediation services, and must give 30 days notice of the dispute to these services if a health care institution is involved.

Subsection 158(g) requires ten days notice to the institution and the Federal Mediation Service before strikes or picketing are allowed at a health care institution. Section 169 allows employees of such institutions to pay dues to nonreligious charitable funds in lieu of union dues if that person's religion "has historically held conscientious objections to joining or financially supporting labor organizations." Finally, § 183 allows the Director of the Federal Mediation Service to convene an impartial Board of Inquiry to assist in resolving labor dispute impasses involving health care institutions where "a threatened or actual strike or lockout . . . [will] substantially interrupt the delivery of health care in the locality concerned . . . ."

with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB no. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]

[1] By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision.

S. Rep. No. 93-766, 93d Cong., 2d Sess. 5 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 3946, 3950; H. Rep. No. 93-1051, 93d Cong., 2d Sess. 7 (1974). *See, e.g., Mary Thompson Hospital, Inc.* v. *NLRB*, 621 F.2d 858 (7th Cir. 1980); *NLRB* v. *Mercy Hospital Association*, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980); *NLRB* v. *West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978).

A major purpose of the 1974 amendments was to minimize "the potential for increased disruption of health care delivery resulting from increased labor activity by employees of health care institutions now that their activities were protected" by the Act. *NLRB* v. *IBEW*, 548 F.2d 704, 711 (7th Cir.), *cert. denied*, 434 U.S. 837 (1977).[7] In *NLRB* v. *St. Francis Hospital*, 601 F.2d 404, 411 (9th Cir. 1979), the Ninth Circuit acknowledged that

> In considering legislation to amend the Act, it was immediately recognized that the health care industry was unique and that disruptions caused by organizational drives and related activities at a hospital were a far more

[7] Rep. Erlenborn underlined Congress' concern for avoiding undue disruption of health care services.

> I think much credit is to be given to the House and Senate sponsors of the legislation this year in recognizing the unique situation of the health care industry and the damage that can occur to a community if there is an unwarranted interruption of the health care delivery services, particularly if that interruption comes without sufficient notice to accommodate the community by providing alternative health care delivery during the period of the strike.

120 Cong. Rec. 16,902 (1974).

serious concern than at an industrial plant given the grave nature of medical care and the fact that "Hospital care is not storable." S. Rep. No. 93-766, 93rd Cong., 2d Sess. 39 (1974), 2 [1974] U.S. Code Cong. & Admin. News, pp. 3946, 3953 (individual views of Sen. Dominick).

The Board's Decision

Although we would not approve the automatic denial of health care institution status to an employer merely because it was a blood bank, neither do we conversely read the Act as amended categorically to require that every blood bank be classified as a health care institution. The facts of each case will vary, and each case must be reviewed individually. The Board's findings in any case must be upheld if supported by substantial evidence. *American Diversified Foods, Inc.* v. *NLRB*, 640 F.2d 893, 894 (7th Cir. 1981). Under the facts of this case, we cannot uphold the Board's determination as supported by substantial evidence.

The Regional Director relied upon the authority of *Sacramento Medical Foundation Blood Bank*, 220 N.L.R.B. 904 (1975), and *San Diego Blood Bank*, 219 N.L.R.B. 116 (1975), to deny health care institution status to NSBC. *Sacramento Blood Bank* was an independent nonprofit corporation serving the blood requirements of approximately forty hospitals and health care institutions in the area. The Board's decision in that case did not reveal whether the blood bank performed any services beyond recruiting donors, testing, processing, and distributing blood. The Board's entire analysis of health care institution status in that case was a one-sentence footnote stating that "[w]e also rely on *San Diego Blood Bank*, *supra*, in finding that the Employer is not a health care institution within the meaning of the 1974 health care amendments (P.L. 93-360)." 220 N.L.R.B. at 904.[8]

[8] The Union cites *Greene County Chapter American Red Cross and Springfield Regional Red Cross Blood Center*, 221 N.L.R.B. 776 (1975), which

In *San Diego Blood Bank*, 219 N.L.R.B. 116 (1975), the employer was an independent nonprofit corporation 80% of whose services supplied the blood needs of five nonprofit hospitals, and which overall served twenty-nine hospitals. As in *Sacramento Blood Bank*, the Board did not reveal whether the San Diego blood bank provided any services other than the recruiting of donors, and the processing and distribution of blood. In *San Diego*, the Board devoted a single paragraph to determining the health care institution issue:

> We also find that the Employer is not a health care institution within the meaning of the 1974 amendments. The legislative history makes it clear that the special provisions of the Act applicable to health care institutions relate to "patient care situations" and not "purely administrative health connected facilities." See 120 Cong. Rec. H4594 (daily ed., May 30, 1974); 120 Cong. Rec. S7310 (daily ed., May 7, 1974). Since supplying blood to hospitals obviously does not involve patient care, blood banks are not health care institutions within the meaning of the amendments.

219 N.L.R.B. at 116 n17.

The parties have not cited, nor has this court found, any other Board cases which would shed more light on the issue, nor does it appear there are any Court of Appeals decisions determining the status of blood banks under the 1974 amendments.

The Regional Director's reliance, in the case at bar, on *Sacramento Medical Foundation Blood Bank* and *San Diego Blood Bank* is not compelling because (1) the record shows that the NSBC carried on activities beyond the recruitment of donors, processing, and distribution of blood, and (2) in any event, the Board's superficial analysis in those cases illustrates its disregard for Congress' concern to promote stability in patient care delivery through the 1974 amendments. While we

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similarly confines its analysis of health care status to a footnoted citation to *San Diego Blood Bank*. *Id.* at 776 n.3.

recognize that Congress vested the Board with the responsibility for developing federal labor policy in the health care field, *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 501 (1978), the Board cannot ignore Congressional intent. *See NLRB* v. *Mercy Hospital Association*, 606 F.2d 22, 24 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980); *St. Vincent's Hospital* v. *NLRB*, 567 F.2d 588, 590 (3d Cir. 1977).

The legislative history indicates that the crucial factor in the definition of health care institutions is patient welfare:

> The scope of the application of the amendment is meant to include patient care situations and is not meant to include purely administrative health connected facilities. As an example, an insurance company specializing in medical coverage would not fall under the scope of these amendments, but would remain under general coverage of the act. An administrative facility or operation within a hospital, however, would be within the scope of the amendments as there would be a connection directly and indirectly with ongoing patient care. The crucial connection is the welfare of the patients and such connection would in certain cases be mere geographical proximity to ongoing patient care.

120 Cong. Rec. 13,559 (1974) (remarks of Sen. Taft).

In the instant case, the Regional Director found that "no patient care occurs at the facility." He noted, for example, that the only persons who had participated in the "plasma freeze" procedure up to the time of the Board hearing had been staff members and not patients, and that although money had been set aside to establish an outpatient transfusion service for hemophiliacs, this program was not yet in operation. It is true that as of the date of the hearing, only staff members had actually participated in the plasma freeze procedure, but Dr. Farrales, the Center's Medical Director, also indicated that this process was evolving through its start-up phase: "[t]here have been freezes done at North Suburban where we did it on

donors. We had donors from our staff. The machine has been purchased. The room has been set and so we are in the process of developing." The Regional Director ignored the existence of autologous donors who have blood extracted for their own future use. In oral argument, the Board characterized these people as healthy persons, not patients, and reasoned that in the event of a labor dispute, autologous donors could simply reschedule their blood extraction. Although rescheduling might ordinarily be possible, we can envision situations where the donor's operation has to be performed in the immediate future.

The Board's requirement that patient care physically occur *at* the Glenview facility, in any event, sidesteps the purpose of the Act's amendments. The legislative history indicates that geographical proximity may convert a purely administrative facility into a health care facility if located *within* a hospital because then "there would be a connection directly and indirectly with ongoing patient care." 120 Cong. Rec. 13,559 (1974) (remarks of Sen. Taft). But the converse does not necessarily follow. The fact that NSBC is located apart from any one hospital, precisely because it is designed to serve thirteen hospitals, cannot *a fortiori* deprive it of health care institution status if the Center is in fact integrally related to patient care and not purely administrative. The fact that patients are not generally treated at the facility does not itself mean that the Center is purely administrative if in fact a disruption in services would seriously impair patient welfare, the central concern of the amendments.

We reject the Board's argument that the nature of a blood bank's services is analogous to those of pharmaceutical suppliers or hospital laundry services in that all these enterprises supply essential goods and services but do not provide "patient care." While a strike at a pharmaceutical supplier or laundry service could force a hospital to seek alternate sources of supply involving some inconvenience and possibly a greater price,

a labor disruption at NSBC could have a much more serious impact since blood is a crucial commodity which may not always be as fungible as other items.[9] A steady supply of blood of the required types is absolutely crucial to patient welfare. The hospitals in this case maintain no significant independent stockpiles of blood. Moreover, as previously discussed, the Center in this case provides consultation and other services beyond the collection, processing, and distribution of blood. NSBC is a nonprofit organization which, in reality, is simply a consolidation of the separate blood banks of the thirteen hospitals, each of which is represented on the Center's Board of Directors. The blood services provided in this case logically deserve the greater protections against labor disruption provided by Congress in the 1974 amendments.[10]

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[9] In the context of product liability law, for example, several states have recognized the unique nature of blood as a product and have acknowledged by legislation the critical need to assure patients an unimpeded blood supply. These states have declared the supply of blood to be a service, and not a sale, in order to avoid strict liability for contaminated blood. *See, e.g., Cal. [Health & Safety] Code* § 1606 (West); Mich. Stats. Ann. § 14.15 (1921).

[10] Because we are addressing the wholly unique situation of blood services, we are not persuaded by the Board's comparison of NSBC with the laboratories in *Boston Medical Laboratory, Inc.*, 235 N.L.R.B. 1271, 1271 n.2. (1978), and *Damon Medical Laboratory, Inc.*, 234 N.L.R.B. 333, 334 n.1 (1978), where the Board found the testing of human medical specimens not to involve patient care for purposes of the 1974 amendments. *Boston Medical* relied upon *Damon* which, in turn, had based its ruling upon *San Diego Blood Bank* and *Sacramento Medical Foundation Blood Bank*, stating that laboratory operations are "analogous" to blood banks. While we would not consider such a glib comparison to be compelling, we express no opinion as to the propriety of the Board's findings in *Boston Medical or Damon*, or likewise, the similar findings in *Center for Laboratory Medicine*, 234 N.L.R.B. 387, 387 n.3 (1978), cited by the Union, in which the Board also relied upon *Damon*.

For the reasons expressed herein, the petition to set aside the Board's order is granted and the Board's cross-application for enforcement is denied. Because we find that the Center is a health care institution within the meaning of the Act, the Board must follow Congress' directive against the undue proliferation of bargaining units in the health care industry when considering the appropriate bargaining unit in any further proceedings. *Mary Thompson Hospital, Inc.* v. *NLRB*, 621 F.2d 858 (7th Cir. 1980).

PETITION TO SET ASIDE GRANTED;
ENFORCEMENT DENIED.

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Respondent's Reply Brief

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No. 81-188

In the Supreme Court of the United States

OCTOBER TERM, 1981

CENTER FOR LABORATORY MEDICINE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

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CENTER FOR LABORATORY MEDICINE, INC., PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Contrary to petitioner's prediction (Pet. 5 n.6), the Seventh Circuit's decision in *North Suburban Blood Center* v. *NLRB*, No. 80-2273 (Oct. 1, 1981) (App., *infra*), holding that the North Suburban Blood Center is a "health care institution" (29 U.S.C. 152 (14)), does not conflict with the Third Circuit's decision in this case.

First, unlike the bargaining unit challenged in *North Suburban*, the unit of technicians and technologists approved in this case would be appropriate even assuming that petitioner is a "health care insti-

tution" (29 U.S.C. 152(14)). See, *e.g.*, *Barnert Memorial Hospital Center*, 217 N.L.R.B. 775, 776-777 (1975). Enforcement of the Board's order in this case, therefore, is not inconsistent with the holding of the court of appeals in *North Suburban*.[1]

Second, the Seventh Circuit's holding in *North Suburban* rests heavily on the unusual facts of that case. The North Suburban Blood Center was established by 13 hospitals "to serve more efficiently and economically the blood needs of all of the hospitals jointly" (App., *infra*, 3a). The hospitals apparently maintained joint control of the Center through their representatives on the Center's board of directors and its Medical Advisory Board (see *ibid.*). According to the court of appeals, the Center "represent[ed] the consolidation of the internal blood bank operations of the hospitals" (*ibid.*). See *id.* at 13a. Moreover, in addition to supplying blood to the participating hospitals, the Center provided consulting services, and sometimes (albeit infrequently) provided treatment to patients. See *id.* at 4a-5a & n.4; see also *id.* at 13a.

On these facts, the court of appeals rejected the Board's finding that " 'no patient care occurs at the [Center]' "(*id.* at 11a) as well as the Board's conclusion that the Center was not a "health care institution," which was based upon that finding. The court specifically stated that the question whether a particular entity is a "health care institution" turns

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[1] Thus, even if there were a conflict among the courts of appeals concerning the scope of the definition of "health care institution" (29 U.S.C. 152(14)), this case would not present an appropriate vehicle for this Court's consideration of the issue.

on the facts of each case and that "each case must be reviewed individually" (App., *infra*, 8a). Indeed, the court apparently distinguished *Damon Medical Laboratory, Inc.*, 234 N.L.R.B. 333, 334 n.1 (1978); and *Center for Laboratory Medicine, Inc.*, 234 N.L.R.B. 387, 387 n.3 (1978), on the ground that they did not involve "the wholly unique situation of blood services" of the sort provided by the Center (App., *infra*, 13a-14a n.10).

For these reasons, as well as those set forth in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

OCTOBER 1981

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-2273

NORTH SUBURBAN BLOOD CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board
No. 13-CA-19881

ARGUED JUNE 4, 1981—DECIDED OCTOBER 1, 1981

Before PELL and SPRECHER, *Circuit Judges*, and EAST, *Senior District Judge.**

PELL, *Circuit Judge*. North Suburban Blood Center (NSBC or Center) has petitioned this court, pursuant to 29 U.S.C. § 160(f), to review and set aside an order of the National Labor Relations Board (Board or NLRB) which determined that the Center had

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* William G. East, Senior District Judge for the District of Oregon, is sitting by designation.

violated 29 U.S.C. §§ 158(a)(1) and (5) by refusing to bargain with the union certified as the collective bargaining representative of the petitioner's full and regular part-time distribution driver and dispatch employees,[1] and directed the Center to bargain with the union. The Board has cross-applied for enforcement of its order.

The union sought certification as the exclusive bargaining representative of NSBC's driver and dispatch employees pursuant to 29 U.S.C. § 159(c). At the representation hearing before the Board's Regional Director, the Center objected to this unit definition as contrary to a Congressional directive to avoid undue proliferation of bargaining units in health care institutions. The Regional Director rejected NSBC's contention and determined that the Center was not a health care institution under § 152(14) of the Act. On that basis, he refused to apply considerations regarding the proliferation of bargaining units and directed an election. Ultimately, after the election, the Regional Director certified the union as the exclusive bargaining representative of the Center's drivers and dispatchers. After the Center refused to bargain, the union filed the unfair labor practice charges here at issue. The sole question decided in this appeal is whether the North Suburban Blood Center is a health care institution within the meaning of 29 U.S.C. § 152(14).[2]

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[1] The Board's Decision and Order is reported at 251 N.L.R.B. No. 98 (1980). This decision was based upon findings made by the Board's Regional Director in the prior representation hearing.

[2] Because of our disposition of the case we need not address the disputed issue of the propriety of the Board's inclusion of two on-call drivers in the bargaining unit.

The Nature of the Employer's Business

The North Suburban Blood Center is a nonprofit entity formed by thirteen hospitals in Chicago's north and northwest suburbs to meet the total blood requirements of the participating hospitals. NSBC represents the consolidation of the internal blood bank operations of the hospitals which established the Center with their own funds to serve more efficiently and economically the blood needs of all of the hospitals jointly. Soon after NSBC was established, it was incorporated as a separate nonprofit organization, but it still retains organizational connections with the thirteen hospitals. The Center's Board of Directors is comprised of a hospital administrator or physician of each individual hospital, and a blood bank director or pathologist from each hospital serves on NSBC's Medical Advisory Board. The president and medical director of the Center is a physician licensed in Illinois and certified by the American Board of Pathology.

Donor recruiting and blood collection, processing, storage, inventory control, and distribution, previously performed separately by each hospital, are now consolidated into a unified operation carried out by the NSBC. The Center obtains blood from donors at its own facility located in Glenview, Illinois, at hospital facilities it uses,[3] or through exchange agreements with blood banks serving other hospitals. In addition to acquiring blood, the Center purchases blood-related supplies in bulk for the hospitals.

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[3] Some of the hospitals have not retained any blood donor facilities on premises. Others maintain space for the Center's use, but NSBC provides its own equipment and staff. Still other hospitals use their own facilities and staff, but operate under the ultimate direction of the Center.

The Center maintains laboratories for testing, processing, and preparing blood at the Glenview facility. In addition, the Center's administrative vice-president, Dan Connor, testified that NSBC operates a reference and consultation laboratory to which the hospitals can send problem cases when "they want to cross-match [blood] . . . and for whatever reason they have difficulty having the cross-matching compatible because the donor or the patient may have some irregular antibodies because of the previous transfusions. . . . [At the reference laboratory] we screen it against various known antiserums and then screen the donor for blood to come up with compatible blood for that patient that will not result in a transfusion reaction."

Other functions performed by the Center include diagnostic testing of patient specimens, consultation by the Center's Medical Director with physicians regarding particular patients, and the provision of blood and blood products for specific patients when requested by a physician from one of the hospitals. The Center can perform a plasma extraction procedure known as a "plasma freeze." [4] Center employees also draw blood from "autologous" donors—those who come to have blood drawn for their own use, such as persons with rare blood types whose blood is extracted for their own future surgery. In addition, some people come to the Center for "therapeutic phlebotomies," which involve the removal of excess red blood cells, at the order of their attending physi-

[4] This procedure involves extracting a person's blood, which is then centrifuged to separate the blood elements—white and red blood cells, plasma, and platelets. Depending upon the needs of the person, some portion of the blood is removed and the rest returned. The entire process consumes from one to three hours.

cians. In these cases, the blood removed is not used for later transfusions. Such donors are really receiving treatment as patients, although these treatments constitute a very small percentage of the Center's overall activity. Finally, NSBC's medical director treats any donors experiencing complications at the Center.

Status of Health Care Institutions Under the Act

Prior to the 1974 amendments to the National Labor Relations Act (Act), nonprofit hospitals were explicitly exempted by § 152(2) from the Act's definition of "employers" subject to the Act's coverage. Although blood banks were not statutorily exempt from the Act, the Board occasionally had declined to assert jurisdiction over blood banks when it determined that the blood bank was "intimately related" to the patient care at the exempt hospitals.[5] In 1974,

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[5] In *Inter-County Blood Banks, Inc.*, 165 N.L.R.B. 252 (1967), the Board declined to assert jurisdiction over a blood bank which primarily serviced nonprofit hospitals then exempt from the Act because it found, under the particular facts of the case, that the employer's operations were "intimately related to the operations of the hospitals to which it supplies blood for the treatment of patients. . . ." *Id.* at 253. There, the blood bank maintained 13 donor centers most of which were located in hospitals served by the blood bank. The hospitals supplied the space at no charge, but the blood bank operated the donor centers with its own equipment and staff. In *American National Red Cross*, 211 N.L.R.B. 587 (1974), however, the Board asserted jurisdiction where the operation of the employer's blood program occurred off the hospitals' premises and served both exempt and nonexempt hospitals. The Board found that the employer's operations were unlike those found intimately connected with exempt hospitals in *Inter-County*. We express no opinion as to the appropriateness of such findings under prior law or under the 1974 amendments, but only cite these examples to il-

Congress removed the non-profit hospital exemption from § 152(2) and added a new subsection 152(14), which reads: "The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons." Although nonprofit hospitals now are subject to the Act's coverage as health care institutions, a determination that an entity is a health care institution requires unions of those organizations to abide by particular provisions added to the Act in 1974 designed to minimize disruption of patient care services.[6] Additionally, if the petitioner is found to be

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lustrate the status of blood banks under Board decisions prior to the 1974 amendments to the Act.

[6] A proviso to Section 158(d) pertaining to bargaining for a new contract where a previous contract is in effect but about to expire contains notice requirements which are increased by thirty days for health care institutions. This section also extends the period during which strikes and lockouts are prohibited by 30 additional days for health care institutions. Finally, when bargaining for an initial contract, parties to a dispute must participate in state and federal mediation services, and must give 30 days notice of the dispute to these services if a health care institution is involved.

Subsection 158(g) requires ten days notice to the institution and the Federal Mediation Service before strikes or picketing are allowed at a health care institution. Section 169 allows employees of such institutions to pay dues to nonreligious charitable funds in lieu of union dues if that person's religion "has historically held conscientious objections to joining or financially supporting labor organizations. Finally, § 183 allows the Director of the Federal Mediation Service to convene an impartial Board of Inquiry to assist in resolving labor dispute impasses involving health care institutions where "a threatened or actual strike or lockout . . . [will] substantially interrupt the delivery of health care in the locality concerned. . . ."

a health care institution, the Board must abide by a Congressional directive that

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the reecnt Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB no. 14[illegible], 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]

[1] By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision.

S. Rep. No. 93-766, 93d Cong., 2d Sess. 5 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 3946, 3950; H. Rep. No. 93-1051, 93d Cong., 2d Sess. 7 (1974). *See, e.g., Mary Thompson Hospital, Inc.* v. *NLRB*, 621 F.2d 858 (7th Cir. 1980); *NLRB* v. *Mercy Hospital Association*, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980); *NLRB* v. *West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978).

A major purpose of the 1974 amendments was to minimize "the potential for increased disruption of health care delivery resulting from increased labor activity by employees of health care institutions now that their activities were protected" by the Act. *NLRB* v. *IBEW*, 548 F.2d 704, 711 (7th Cir.), *cert. denied*, 434 U.S. 837 (1977).[7] In *NLRB* v. *St. Francis*

[7] Rep. Erlenborn underlined Congress' concern for avoiding undue disruption of health care services.

> I think much credit is to be given to the House and Senate sponsors of the legislation this year in recognizing

Hospital, 601 F.2d 404, 411 (9th Cir. 1979), the Ninth Circuit acknowledged that

> In considering legislation to amend the Act, it was immediately recognized that the health care industry was unique and that disruptions caused by organizational drives and related activities at a hospital were a far more serious concern than at an industrial plant given the grave nature of medical care and the fact that "Hospital care is not storable." S. Rep. No. 93-766, 93rd Cong., 2d Sess. 39 (1974), 2 [1974] U.S. Code Cong. & Admin. News, pp. 3946, 3953 (individual views of Sen. Dominick).

The Board's Decision

Although we would not approve the automatic denial of health care institution status to any employer merely because it was a blood bank, neither do we conversely read the Act as amended categorically to require that every blood bank be classified as a health care institution. The facts of each case will vary, and each case must be reviewed individually. The Board's findings in any case must be upheld if supported by substantial evidence. *American Diversified Foods, Inc.* v. *NLRB*, 640 F.2d 893, 894 (7th Cir. 1981). Under the facts of this

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the unique situation of the health care industry and the damage that can occur to a community if there is an unwarranted interruption of the health care delivery services, particularly if that interruption comes without sufficient notice to accommodate the community by providing alternative health care delivery during the period of the strike.

120 Cong. Rec. 16,902 (1974).

case, we cannot uphold the Board's determination as supported by substantial evidence.

The Regional Director relied upon the authority of *Sacramento Medical Foundation Blood Bank*, 220 N.L.R.B. 904 (1975), and *San Diego Blood Bank*, 219 N.L.R.B. 116 (1975), to deny health care institution status to NSBC. *Sacramento Blood Bank* was an independent nonprofit corporation serving the blood requirements of approximately forty hospitals and health care institutions in the area. The Board's decision in that case did not reveal whether the blood bank performed any services beyond recruiting donors, testing, processing, and distributing blood. The Board's entire analysis of health care institution status in that case was a one-sentence footnote stating that "[w]e also rely on *San Diego Blood Bank*, *supra*, in finding that the Employer is not a health care institution within the meaning of the 1974 health care amendments (P.L. 93-360)." 220 N.L.R.B. at 904.[8]

In *San Diego Blood Bank*, 219 N.L.R.B. 116 (1975), the employer was an independent nonprofit corporation 80% of whose services supplied the blood needs of five non-profit hospitals, and which overall served twenty-nine hospitals. As in *Sacramento Blood Bank*, the Board did not reveal whether the San Diego blood bank provided any services other than the recruiting of donors, and the processing and distribution of blood. In *San Diego*, the Board devoted a

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[8] The Union cites *Greene County Chapter American Red Cross and Springfield Regional Red Cross Blood Center*, 221 N.L.R.B. 776 (1975), which similarly confines its analysis of health care status to a footnoted citation to *San Diego Blood Bank*. *Id.* at 776 n.3.

single paragraph to determining the health care institution issue:

> We also find that the Employer is not a health care institution within the meaning of the 1974 amendments. The legislative history makes it clear that the special provisions of the Act applicable to health care institutions relate to "patient care situations" and not "purely administrative health connected facilities." See 120 Cong. Rec. H4594 (daily ed., May 30, 1974); 120 Cong. Rec. S7310 (daily ed., May 7, 1974). Since supplying blood to hospitals obviously does not involve patient care, blood banks are not health care institutions within the meaning of the amendments.

219 N.L.R.B. at 116 n17.

The parties have not cited, nor has this court found, any other Board cases which would shed more light on the issue, nor does it appear there are any Court of Appeals decisions determining the status of blood banks under the 1974 amendments.

The Regional Director's reliance, in the case at bar, on *Sacramento Medical Foundation Blood Bank* and *San Diego Blood Bank* is not compelling because (1) the record shows that the NSBC carried on activities beyond the recruitment of donors, processing, and distribution of blood, and (2) in any event, the Board's superficial analysis in those cases illustrates its disregard for Congress' concern to promote stability in patient care delivery through the 1974 amendments. While we recognize that Congress vested the Board with the responsibility for developing federal labor policy in the health care field; *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 501 (1978), the Board

cannot ignore Congressional intent. *See NLRB* v. *Mercy Hospital Association*, 606 F.2d 22, 24 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980); *St. Vincent's Hospital* v. *NLRB*, 567 F.2d 588, 590 (3d Cir. 1977).

The legislative history indicates that the crucial factor in the definition of health care institutions is patient welfare:

> The scope of the application of the amendment is meant to include patient care situations and is not meant to include purely administrative health connected facilities. As an example, an insurance company specializing in medical coverage would not fall under the scope of these amendments, but would remain under general coverage of the act. An administrative facility or operation within a hospital, however, would be within the scope of the amendments as there would be a connection directly and indirectly with ongoing patient care. The crucial connection is the welfare of the patients and such connection would in certain cases be mere geographical proximity to ongoing patient care.

120 Cong. Rec. 13,559 (1974) remarks of Sen. Taft).

In the instant case, the Regional Director found that "no patient care occurs at the facility." He noted, for example, that the only persons who had participated in the "plasma freeze" procedure up to the time of the Board hearing had been staff members and not patients, and that although money had been set aside to establish an outpatient transfusion service for hemophiliacs, this program was not yet in operation. It is true that as of the date of the hearing, only staff members had actually partici-

pated in the plasma freeze procedure, but Dr. Farrales, the Center's Medical Director, also indicated that this process was evolving through its start-up phase: "[t]here have been freezes done at North Suburban where we did it on donors. We had donors from our staff. The machine has been purchased. The room has been set and so we are in the process of developing." The Regional Director ignored the existence of autologous donors who have blood extracted for their own future use. In oral argument, the Board characterized these people as healthy persons, not patients, and reasoned that in the event of a labor dispute, autologous donors could simply reschedule their blood extraction. Although rescheduling might ordinarily be possible, we can envision situations where the donor's operation has to be performed in the immediate future.

The Board's requirement that patient care physically occur *at* the Glenview facility, in any event, sidesteps the purpose of the Act's amendments. The legislative history indicates that geographical proximity may convert a purely administrative facility into a health care facility if located *within* a hospital because then "there would be a connection directly with ongoing patient care." 120 Cong. Rec. 13,559 (1974) (remarks of Sen. Taft). But the converse does not necessarily follow. The fact that NSBC is located apart from any one hospital, precisely because it is designed to serve thirteen hospitals, cannot *a fortiori* deprive it of health care institution status if the Center is in fact integrally related to patient care and not purely administrative. The fact that patients are not generally treated at the facility does not itself mean that the Center is purely administrative if in fact a disruption in services

would seriously impair patient welfare, the central concern of the amendments.

We reject the Board's argument that the nature of a blood bank's services is analogous to those of pharmaceutical suppliers or hospital laundry services in that all these enterprises supply essential goods and services but do not provide "patient care." While a strike at a pharmaceutical supplier or laundry service could force a hospital to seek alternate sources of supply involving some inconvenience and possibly a greater price, a labor disruption at NSBC could have a much more serious impact since blood is a crucial commodity which may not always be as fungible as other items.[9] A steady supply of blood of the required types is absolutely crucial to patient welfare. The hospitals in this case maintain no significant independent stockpiles of blood. Moreover, as previously discussed, the Center in this case provides consultation and other services beyond the collection, processing, and distribution of blood. NSBC is a nonprofit organization which, in reality, is simply a consolidation of the separate blood banks of the thirteen hospitals, each of which is represented on the Center's Board of Directors. The blood services provided in this case logically deserve the greater protections against labor disruption provided by Congress in the 1974 amendments.[10]

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[10] Because we are addressing the wholly unique situation of blood services, we are not persuaded by the Board's com-

For the reasons expressed herein, the petition to set aside the Board's order is granted and the Board's cross-application for enforcement is denied. Because we find that the Center is a health care institution within the meaning of the Act, the Board must follow Congress' directive against the undue proliferation of bargaining units in the health care industry when considering the appropriate bargaining unit in any further proceedings. *Mary Thompson Hospital, Inc.* v. *NLRB*, 621 F.2d 858 (7th Cir. 1980).

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